255 N.C. App.—No. 4 Pages 696-860

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 1, 2019

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OF
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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
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COURT OF APPEALS

CASES REPORTED

FILED 3 OCTOBER 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Appealability—appeal to Insurance Commissioner not taken—The Insurance Commissioner correctly concluded that an action by the Reinsurance Facility that had never been appealed was not properly before him. The action was not the subject to judicial review at superior court and was not properly before the Court of Appeals. **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

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Clean hands—reimbursement of Reinsurance Facility—fraud by executive—unclean hands—The Insurance Commissioner did not abuse his discretion by determining that estoppel, ratification, and general equitable relief would not preclude the Reinsurance Facility from requiring repayment by an insurance company of previously reimbursed claims that were fraudulent. Even though the insurance company argued that the Facility's audit process did not discover the fraud, the insurance company itself was in violation of its duty. **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

INSURANCE

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Agent—negligence—duty of care—summary judgment—Summary judgment for defendant was not appropriate on a negligence claim against an insurance agent for not obtaining insurance on property without a vacancy exclusion. If a trier of fact were to believe the evidence that plaintiff requested a vacancy exclusion and that defendant sought to obtain a policy based on that request, then defendant undertook a duty to procure such a policy. **Holmes v. Sheppard, 739.**

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Duty to defend—liability policy—sexual assault on defendant's daughter—declaratory judgment—There was no duty to defend by an insurance company where the policy holders were sued for negligence arising from a sexual assault upon defendant John Doe's daughter. The policy provided coverage for suits arising from bodily injury or property damage, and John Doe's claims for loss of his daughter's services and their damaged relationship did not arise from bodily injury as defined by the policy. **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Phillips, 758.**

Prehearing discovery—hearing before Insurance Commissioner—Defendant was correctly denied prehearing discovery prior to a hearing before the Insurance Commissioner in a case that rose from the Reinsurance Facility's demand that an insurance company repay reimbursements after fraud by a company executive was discovered. The specific statute controlling the case, N.C.G.S. § 58-2-50, did not provide for formal discovery for this hearing, and the Commissioner had not promulgated any rules for formal discovery. **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

Reinsurance Facility—fraud by insurance executive—repayment to Facility—The Reinsurance Facility acted within its statutory authority when it ordered an insurance company to repay reimbursements to the insurance company by the Facility after fraud by an executive of the insurance company was discovered. Although the insurance company argued that there was no express authority that empowered the Facility to order the repayment, the Facility acted within its statutory authority to do what was necessary to accomplish the purpose of the Facility. N.C.G.S. § 58-37-35(g)(12). **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

DISCOVERY INSURANCE COMPANY, PETITIONER
v.
THE NORTH CAROLINA DEPARTMENT OF INSURANCE, COMMISSIONER OF INSURANCE WAYNE GOODWIN AND THE NORTH CAROLINA REINSURANCE FACILITY, RESPONDENTS

No. COA17-285

Filed 3 October 2017

1. Insurance—Reinsurance Facility—fraud by insurance executive—repayment to Facility

The Reinsurance Facility acted within its statutory authority when it ordered an insurance company to repay reimbursements to the insurance company by the Facility after fraud by an executive of the insurance company was discovered. Although the insurance company argued that there was no express authority that empowered the Facility to order the repayment, the Facility acted within its statutory authority to do what was necessary to accomplish the purpose of the Facility. N.C.G.S. § 58-37-35(g)(12).

2. Insurance—Reinsurance Facility—fraudulent reimbursement losses—recovery—civil action not necessary

The Reinsurance Facility was not required to bring suit to recover reimbursements it had made to an insurance company where fraud by an executive of the company was discovered after the reimbursements were made. The Facility has the authority to order a member company to correct claims reimbursements erroneously paid by the Facility due to fidelity losses arising from claims handling.

3. Insurance—Reinsurance Facility—reimbursement of fraudulent claims—recovery—findings

Findings and conclusions by the Insurance Commissioner were supported by the whole record in a case arising from fraud by an insurance company executive that was discovered after the Facility reimbursed the company for claims and the Facility sought repayment of the reimbursement.

4. Equity—Clean hands—reimbursement of Reinsurance Facility—fraud by executive—unclean hands

The Insurance Commissioner did not abuse his discretion by determining that estoppel, ratification, and general equitable relief would not preclude the Reinsurance Facility from requiring repayment by an insurance company of previously reimbursed claims

that were fraudulent. Even though the insurance company argued that the Facility's audit process did not discover the fraud, the insurance company itself was in violation of its duty.

5. Insurance—prehearing discovery—hearing before Insurance Commissioner

Defendant was correctly denied prehearing discovery prior to a hearing before the Insurance Commissioner in a case that rose from the Reinsurance Facility's demand that an insurance company repay reimbursements after fraud by a company executive was discovered. The specific statute controlling the case, N.C.G.S. § 58-2-50, did not provide for formal discovery for this hearing, and the Commissioner had not promulgated any rules for formal discovery.

6. Appeal and Error—appealability—appeal to Insurance Commissioner not taken

The Insurance Commissioner correctly concluded that an action by the Reinsurance Facility that had never been appealed was not properly before him. The action was not the subject to judicial review at superior court and was not properly before the Court of Appeals.

Appeal by petitioner from order entered 18 November 2016 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 6 September 2017.

Graebe Hanna & Sullivan, PLLC, by Douglas W. Hanna, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson and Assistant Attorney General M. Denise Stanford, for respondent-appellee North Carolina Department of Insurance and the Commissioner of Insurance.

Young Moore and Henderson, P.A., by Marvin M. Spivey, Jr., Glenn C. Raynor and Angela Farag Craddock, for respondent-appellee North Carolina Reinsurance Facility.

TYSON, Judge.

I. Background

Respondent, the North Carolina Reinsurance Facility ("the Facility"), is a statutory entity, consisting of all motor vehicle liability insurers in

North Carolina as required members. N.C. Gen. Stat. § 58-37-5 (2015). Discovery Insurance Company ("Discovery") is a Kinston, North Carolina-based insurance company engaged in selling motor vehicle insurance. Discovery was a member of the Facility at all times relevant to this appeal.

"The Facility is a creation of North Carolina's Compulsory Automobile Liability Insurance Law." *State ex rel. Hunt v. N. Carolina Reinsurance Facility*, 302 N.C. 274, 283, 275 S.E.2d 399, 402 (1981). "The Facility is a pool of insurers which insures drivers who the insurers determine they do not want to individually insure." *Id.* The pertinent provisions are codified in Article 37, Chapter 58 of the General Statutes. N.C. Gen. Stat. §§ 58-37-1 to 58-37-75 (2015) (hereinafter referred to as "the Facility Act").

All insurance companies which write motor vehicle insurance in North Carolina, are required to issue motor vehicle liability coverage insurance to any "eligible risk," as is defined in N.C. Gen. Stat. § 58-37-1, who applies for that coverage, if the coverage can be ceded to the Facility. N.C. Gen. Stat. § 58-37-25(a). After writing a motor vehicle policy, an insurer can retain it as a part of its voluntary business or cede it to the Facility. *Hunt*, 302 N.C. at 283, 275 S.E.2d at 402.

If the policy is ceded, the writing insurer pays the net premium to the Facility, less certain allowed expenses. The Facility becomes liable on that particular policy to reimburse the issuing insurer for claims paid. *Id.* at 283, 275 S.E.2d at 402-3.

When a loss and claim occurs under the policy, the ceding company settles the claim and is reimbursed by the Facility. *Id.* The Facility is only authorized to reinsure coverages arising under motor vehicle insurance policies required to satisfy The Motor Vehicle Safety and Financial Responsibility Act, N.C. Gen. Stat. §§ 20-279.1 *et seq.*, together with any other motor vehicle insurance as is required by federal law or regulation, state law, state administrative code, or rule adopted by the North Carolina Utilities Commission. N.C. Gen. Stat. § 58-37-35(b). The Facility is required to operate on a no profit-no loss basis. N.C. Gen. Stat. § 58-37-35(l).

In November 2011, Discovery uncovered a fraudulent scheme by one of its claims executives, Roland Steed ("Steed"). From early 2005 until November 2011, Steed issued Discovery claim checks to fictitious persons and entities in order to have the proceeds of those checks to be deposited into accounts he controlled. Steed reported the fraudulent payments as legitimate payments under his management and control.

Under his scheme, Steed issued checks for fraudulent payments totaling approximately $5.2 million. Of that total, Steed attributed approximately $1.3 million of those payments to claims on auto liability policies, which had been ceded to the Facility by Discovery. Before Steed's scheme was uncovered, the Facility had reimbursed Discovery for the approximately $1.3 million in claims paid under these ceded policies.

Discovery notified the Facility upon learning of Steed's fraudulent activity in November 2011. Discovery asked the Facility to keep Steed's fraud confidential from all, except a select few of the Facility's executives, to allow the Department of Insurance a period of time required to conduct a criminal fraud investigation.

The Facility honored Discovery's request and did not independently investigate Steed's fraudulent payments, until after Steed and his co-conspirators were indicted in August 2012. Following Steed's indictment, the Facility confirmed the net total of the claims payments attributable to Steed's fraud and reimbursed to Discovery was $1,340,921.25.

In a letter to Discovery dated 25 October 2013, Facility staff noted the Facility only reimburses companies for payments of valid claims. The letter repeated the Facility's conclusion that $1,340,921.25 in reported, but fraudulent, losses reimbursed by the Facility were not valid claim payments, but were fidelity losses that were ineligible for reimbursement. The Facility instructed Discovery to repay these losses to the Facility.

Discovery requested a hearing, pursuant to N.C. Gen. Stat. § 58-37-65(a), before the Facility's Board of Governors ("the Facility Board") to dispute the Facility's staff's 25 October 2013 letter requesting Discovery to repay the loss payments attributable to Steed's frauds. The Facility Board's hearing took place on 24 July 2013. On 19 August 2013, the Facility Board issued a final decision and held Discovery was obligated to repay the Facility the $1,340,921.25 in fraudulent claims payments previously reimbursed by the Facility.

Discovery appealed the Facility Board's decision to the Commissioner of Insurance pursuant to N.C. Gen. Stat. § 58-37-65(b). At a December 2013 meeting, the Facility Board learned Discovery had appealed the Facility Board's 19 August 2013 ruling and had not repaid the fraudulent reimbursements made by the Facility. The Facility Board instructed Facility staff to issue a letter and a Supplemental Account Activity Statement to Discovery on 16 December 2013.

The Hearing Officer, on behalf of the Commissioner of Insurance ("the Commissioner"), issued an order which affirmed the ruling of the Facility Board on 20 October 2014.

Discovery petitioned the Superior Court of Wake County for judicial review of the Commissioner's order pursuant to N.C. Gen. Stat. § 58-37-65(b). The trial court affirmed the Commissioner's Order on 18 November 2016. Discovery timely filed notice of appeal to this Court on 16 December 2016.

II. Jurisdiction

The trial court reviewed Discovery's appeal of the Hearing Officer's order as a civil case pursuant to N.C. Gen. Stat. § 58-2-75(b). Jurisdiction lies in this Court from a final order of the superior court pursuant to N.C. Gen. Stat. § 1-277 (2015) and § 7A-27(b) (2015).

III. Issues

Discovery requests this Court review whether the Commissioner erred by: (1) holding the Facility acted within its statutory authority by ordering Discovery to repay the disputed claim payments; (2) finding the Facility was not required to institute a separate civil action against Discovery to recover the approximately $1.3 million at issue; (3) making findings of fact and conclusions of law regarding the audit responsibilities of the Facility, which are not supported by the whole record; (4) concluding that Discovery's affirmative defense of estoppel was not applicable; (5) not permitting pre-hearing discovery; and, (6) not considering the Facility's authority to issue the Supplemental Account Activity Statement.

IV. Standard of Review

N.C. Gen. Stat. § 58-37-65 of the Facility Act provides that "[a]ll rulings or orders of the Commissioner under this section shall be subject to judicial review as approved in G.S. 58-2-75." This statute provides for judicial review of orders and decisions of the Commissioner by the filing of a petition within 30 days from the date of the delivery of a copy of the order or decision by the Commissioner. Pursuant to *N.C. Reinsurance Facility v. Long*, 98 N.C. App. 41, 390 S.E.2d 176 (1990), N.C. Gen. Stat. § 58-2-75 is to be read in conjunction with N.C. Gen. Stat. § 150B-51 of the Administrative Procedure Act ("APA"). *Long*, 98 N.C. App. at 46, 390 S.E.2d at 179.

Under N.C. Gen. Stat. 150B-51(b), the scope and standard of review is that in "reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency . . . for further proceedings." The court:

> may also reverse or modify the [agency's] decision . . . if the substantial rights of the petitioners may have been

> prejudiced because the [agency's] findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2015).

The particular standard applied to issues on appeal depends upon the nature of the error asserted. "It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *N. C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (brackets, quotation marks and citation omitted).

Errors asserted under subsections 150B-51(b)(1)-(4) are reviewed *de novo*. N.C. Gen. Stat. § 150B-51(c) (2015). Under the *de novo* standard of review, the reviewing court "considers the matter anew and freely substitutes its own judgment[.]" *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation, internal quotation marks, and brackets omitted).

When the error asserted falls within subsections 150B-51(b)(5) and (6), this Court applies the "whole record standard of review." N.C. Gen. Stat. § 150B-51(c) (2015). Under the whole record test,

> [the reviewing court] may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision.

Carroll, 358 N.C. at 660, 599 S.E.2d at 895 (internal citations and quotation marks omitted). " 'Substantial evidence' means relevant evidence

a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2015).

V. Analysis

A. The Facility Board Did Not Exceed Its Authority by Ordering Repayment

[1] Discovery argues the Facility Act does not authorize the Facility to issue an order of repayment. We disagree.

When reviewing an action of the Facility Board, the Commissioner determines whether the challenged Facility action was taken in accordance with the Facility Act, the Facility's Plan of Operation and the Facility's Standard Practice Manual. N.C. Gen. Stat. § 58-37-65(c). Rule E of Section 5 of the Standard Practice Manual states "[f]idelity losses arising out of claims handling shall be the sole responsibility of the member company." Chapter 7.C of Section 4 of the Standard Practice Manual provides that "errors detected through the . . . functions of the Facility will be reported to the carrier with appropriate instructions for prompt correction." Regarding the power of the Facility Board, the Facility Act provides in pertinent part:

> (g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility i*nclude but is not limited to* the following:
>
> . . . .
>
> (12) To adopt and enforce all rules and *to do anything else where the Board is not elsewhere herein specifically empowered which is otherwise necessary to accomplish the purpose of the Facility* and is not in conflict with the other provisions of this Article.

N.C. Gen. Stat. § 58-37-35(g)(12) (emphasis supplied).

1. Canons of Statutory Construction

The rules governing this Court's review and construction of the General Statutes are well established. "[W]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations

not contained therein." *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 43 N.C. App. 715, 719-20, 259 S.E.2d 922, 925 (1979) (quoting *Norris v. Home Security Life Insurance Co.*, 42 N.C. App. 719, 721, 257 S.E.2d 647, 648 (1979)).

"[A] statute, being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope." *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) (citing *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973); *Weston v. Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912)).

2. Discovery's Contentions

Discovery contends the Commissioner erred by concluding as a matter of law "[t]he decision of the Board is thus not inconsistent with any provision of the Facility Act or with any provision of the Plan of Operation or the Manual." Discovery asserts the Commissioner erred because no express authority empowers the Facility to order Discover to repay the approximately $1.3 million fraudulent payments at issue in the Facility Act, the Plan of Operation, and the Standard Practice Manual.

The Facility Act is remedial in nature and is to be construed liberally. *Burgess*, 298 N.C. 520 at 524, 259 S.E.2d at 251. The Facility Act was clearly enacted to serve the remedial purpose of establishing a system of reinsurance to ensure that North Carolina drivers can obtain vehicle liability coverage from insurers, which companies are otherwise unwilling to cover them. *See Hunt*, 302 N.C. at 283, 275 S.E.2d at 402 (stating the Facility "is a creature of North Carolina's Compulsory Automobile Liability Insurance Law," and is "[e]ssentially a pool of insurers which insures drivers who the insurers determine they do not want to individually insure.").

3. Facility Board's Authority

Discovery does not dispute that the approximately $1.3 million of fraudulently paid claims was attributable to Steed's actions of "fidelity losses arising out of claims handling." Rule E of Section 5 of the Standard Practice Manual prohibits the Facility from being responsible for "fidelity losses arising out of claims handling" and squarely places the responsibility to absorb such losses upon the member company. The Commissioner properly concluded the Facility Board acted within the scope of its authority under the Facility Act, by ordering Discovery to repay the sums the Facility fraudulently paid.

Although stated in general terms, N.C. Gen. Stat. § 58-37-35(g)(12) expressly grants the Facility Board the authority "to do anything else . . . which is otherwise necessary to accomplish the purpose of the Facility." The superior court properly affirmed the Commissioner's decision that the Facility Board had acted within its statutory authority to order Discovery to repay the approximately $1.3 million. *See Burgess*, 298 N.C. at 524, 259 S.E.2d at 251 (construing a remedial statute liberally).

The Facility was informed that approximately $1.3 million in reimbursements made to Discovery were actually fraudulent "fidelity losses arising out of claims handling" and attributable to Discovery's employee, Steed. Discovery is required to bear these losses pursuant to Rule E of Section 5 of the Standard Practice Manual. In ordering Discovery to repay the approximately $1.3 million in fraudulent payments, the Facility acted within its statutory authority to do what "is otherwise necessary to accomplish the purpose of the Facility . . . ." N.C. Gen. Stat. § 58-37-35(g)(12). Discovery's argument that the Facility acted outside the scope of its statutory authority is overruled.

B. The Facility is Not Required to Commence a Civil Action to Recover Reimbursements

[2] Discovery argues that because the Facility Act vests the Facility Board with authority "to sue and be sued in the name of the Facility[,]" the Facility's proper and only means for seeking recovery of the fraudulent reimbursement losses would be for the Facility to institute a civil action in superior court. N.C. Gen. Stat. § 58-37-35(g)(1). We disagree.

N.C. Gen. Stat. § 58-37-35(g)(1) provides:

> (g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:
>
> (1) To sue and be sued in the name of the Facility. No judgment against the Facility shall create any direct liability in the individual member companies of the Facility.

Even though N.C. Gen. Stat. § 58-37-35(g)(1) provides statutory authority for the Facility Board to sue on behalf of the Facility, Discovery's contention that this statute is the sole means under which the Facility can seek reimbursement from Discovery under these circumstances is without merit.

Chapter 7.C of Section 4 of the Standard Practice Manual provides that "errors detected through the . . . functions of the Facility will be reported to the carrier with appropriate instructions for prompt correction." Additionally, Rule E of Section 5 of the Standard Practice Manual prohibits the Facility from being responsible for "fidelity losses arising out of claims handling" and places the responsibility for such losses on the member company. Here, it is undisputed that over $1.3 million in fraudulent reimbursement payments were specifically requested by Discovery, though Steed, and were paid by the Facility under the mistaken belief that these were reimbursements for *bona fide* claims under policies ceded to and covered by the Facility.

There is no dispute these reimbursements were paid for fraudulent claims attributable to the fidelity losses of Discovery specifically caused by their employee Steed. Chapter 7.C of Section 4 of the Standard Practice Manual permits the Facility to report errors in claims and give "appropriate instructions for prompt correction." N.C. Gen. Stat. § 58-37-35(g)(12) grants the Facility Board the authority "to do anything else . . . which is otherwise necessary to accomplish the purpose of the Facility."

N.C. Gen. Stat § 58-37-35(l) requires the Facility to operate on a no-profit no-loss basis. Chapter 7.C of Section 4 of the Standard Practice Manual, N.C. Gen. Stat. §§ 58-37-35(l) and 58-37-35(g)(12) construed together provides the Facility Board with the authority to order a member company to correct claims reimbursements erroneously paid by the Facility due to "fidelity losses arising out of claims handling."

Discovery cites two cases it asserts are analogous to the case at bar. *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier* dealt with whether the Commissioner of Insurance had the authority to enforce an insurance rule by issuing a letter ordering an insurance company not to enter a proposed lease transaction. *Charlotte Liberty*, 16 N.C. App. 381, 381-83, 192 S.E.2d 57, 57-58 (1972). This Court determined, "[c]learly the statutes creating the Department of Insurance and prescribing the powers and duties of the Commissioner, do not purport to grant him the power of issuing restraining orders and injunctions." *Id.* at 385, 192 S.E.2d at 59. The Court noted, "[i]n administering the laws relative to the insurance industry, the Commissioner, if he deems it necessary, may apply to the courts for restraining orders and injunctions . . . ." *Id.*

The facts and holding in *Charlotte Liberty* are not analogous to this case. The statutes creating the Department of Insurance did not grant the Commissioner the direct power to issue restraining orders and injunctions. Chapter 7.C of Section 4 of the Standard Practice Manual

reflects the authority of the Facility to instruct member companies to correct "errors detected through the . . . functions of the Facility."

Before Steed's fraudulent actions were uncovered, Discovery and the Facility both conducted business under the erroneous representation that the claim payments submitted by Steed to the Facility for reimbursement were for legitimate claims under ceded policies. The Facility Board acted within its statutory authority to order Discovery to reverse the reimbursement payments, and was neither limited nor required by N.C. Gen. Stat. § 58-37-35(g)(1) to bring suit in the courts to recover those reimbursements. Discovery's argument is overruled.

C. The Commissioner's Findings of Fact and Conclusions of Law Are Supported by the Whole Record

[3] Defendant challenges the Commissioner's Findings of Fact 12 and 13 and Conclusion of Law 13 regarding the Facility's audit responsibilities and asserts the Findings of Fact are not supported by substantial evidence in the whole record. We disagree.

We first note that the majority of the Commissioner's Findings of Fact are not challenged and are binding upon appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citations omitted). Because Findings of Fact 12 and 13 are the only findings, which are challenged by Discovery with specific arguments, any other issues concerning the remaining challenged findings are abandoned. N.C. R. App. P. 28(b)(6).

1. Finding of Fact 12

The Commissioner's Finding of Fact 12 in the amended order states:

> The Facility does not conduct claims audits for the purpose of identifying potential fraudulent claims activity by claims representatives of its member companies; and the Facility does not represent to its member companies that its claims audit process is designed to or capable of identifying fraudulent conduct by claims representatives of its member companies

Discovery contends substantial evidence contradicts the Commissioner's Finding of "The Facility does not conduct claims audits for the purpose of identifying potential fraudulent claims activity by claims representatives of its member companies . . . ." Discovery cites

the testimony of Edith Davis, the Chief Operating Officer of the Facility, to dispute Finding of Fact 12:

> A: The audit responsibilities of the Facility are to audit the member companies and to verify, if you will, the transactions that are being reported to the Facility and look for, you know, poor claims-handling practices, poor underwriting -- the answer I'm giving is in context to claims, not to premiums and underwriting.

Moreover, Discovery cites Section 6 of the Facility's Standard Practice Manual:

> The Facility will review and examine statistical reports and comparisons in order to detect any adverse trends which shall be thoroughly investigated. The Claim Staff, Claim Quality Control Committee, the Audit Staff and both the Audit Committee and Compliance Committee shall coordinate the efforts and exchange information. If these reviews indicate any irregularities, appropriate action will be taken.

After reviewing the portion of Edith Davis' testimony and Section 6 of the Standard Practice Manual cited by Discovery in light of the whole record, the "poor claims-handling practices" referred to by Edith Davis and the "irregularities" referred to in Section 6 of the Standard Practice Manual do not refer to fraudulent claims made by member companies and their employees.

The Standard Practice Manual expressly states that the purpose of Facility audits of business reinsured with the Facility is "to determine that procedures established by the Plan of Operation and the Rules of Operation have been complied with, and that policies that have been reinsured are receiving the same service as those which are not reinsured."

Additional substantial evidence in the record supports Finding of Fact 12. The Facility Act vests the Facility Board with the "power and responsibility . . . to establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Facility will be handled fairly and efficiently." N.C. Gen. Stat. § 58-37-35(g)(11). The Act requires "[e]ach member company shall authorize the Facility to audit that part of the company's business which is written subject to the Facility in a *manner and time prescribed by the Board of Governors*." N.C. Gen. Stat. § 58-37-35(h) (emphasis supplied).

The "manner and time" for audits conducted by the Facility are outlined in Section 6 of the Facility's Standard Practice Manual. The Manual sets forth the internal audit responsibilities of its member companies and requires: "each member is *responsible to ensure that its own internal control and spot-check procedure is sufficient to detect any irregularity in handling business* which is either ceded to the Facility or with respect to which recoupment surcharges are applicable." (Emphasis supplied.)

The Manual further specifies standards regarding each member's internal control procedure:

> These controls include, but are not restricted to, the following items:
>
> 1. That all cessions, premiums and claims are accurately and promptly reported to the Facility;
>
> 2. That all reports, whether on a regular basis or by special call, are filed accurately and promptly;
>
> 3. That all agents are fully complying with the Plan of Operation and Rules of Operation;
>
> 4. That ceded policies are properly rated and ceded claims properly handled; [and,]
>
> 5. That recoupment surcharges for all policies subject to recoupment are properly determined and promptly reported to the Facility.

Additionally, the Standard Practice Manual requires member companies "shall obtain claimant confirmation on a reasonably representative number of claim payments on Facility ceded business." When requested by the Facility, member companies must provide reports of their claim confirmation activities. In addition to the member companies' claim confirmation duties, the Facility retains the right to "confirm with the payee of claim payments made on ceded business[,]" but is not required to do so.

Furthermore, Edith Davis testified:

> We have no responsibility for protecting the company in their claims-handling procedures . . . . I have three auditors and over a hundred member companies and about $675 million worth of losses being reported to the Facility. We have no responsibility to protect the member company and their own claim-handling procedures. That responsibility is solely at the member company.

After carefully reviewing the record, substantial evidence in the record supports the Commissioner's Finding of Fact 12.

2. Finding of Fact 13

Discovery also challenges the Commissioner's Finding of Fact 13, which states:

> When a Facility claims auditor determines that there is not sufficient documentation to substantiate a payment made on a given claim, it is the policy and practice of the Facility to ask the appropriate claims contact person at the member company either to provide the appropriate documentation or to reverse the earlier reimbursement of that payment by the Facility.

Edith Davis testified that when the Facility conducts a claims audit, it looks for the appropriate documentation for a claim payment. Ms. Davis furthered testified:

> Q: All right. Typically when an auditor asks the -- or notes for the company that there's -- they're not finding documentation in the claim file for a particular claim payment, what does your auditor ask the company to do?
>
> A: Provide documentation.
>
> Q: And what happens if the company does not provide documentation?
>
> A: They're advised to reverse the transaction.
>
> Q: So is it correct that it is a typical occurrence between the Facility staff and a company that if they don't -- if the Facility auditor doesn't see appropriate documentation in the claim file, that it asks the company to either provide the documentation or reverse the transaction?
>
> A: Yes.

Discovery references a 2004 audit in which the Facility identified issues with Discovery's policy claims that were managed by Steed and ceded to the Facility. The Facility's 2004 Audit Summary report recommended:

> Based on these 3 files with reporting errors admitted by the carrier and a previous audit which revealed 2 files with incorrectly reported accident dates, may wish to have

> claims dept [sic] review more files from this carrier due to possible reporting errors.

Discovery asserts cross-examination testimony of Edith Davis, given before the Hearing Officer, indicates the Facility failed to follow-up with Steed and Discovery regarding the discrepancies referred to in the 2004 Audit Summary report:

> Q: And based on the information that we provided [. . .] but based on the information that we provided, did you -- was there any information in there that would provide that Mr. - - or that would support the fact that Mr. Steed, on behalf of Discovery at that time, provided an explanation for these discrepancies?
>
> A: There was not. I --

Discovery characterizes this testimony as contradicting Finding of Fact 13 to the extent it indicates it was not the "practice of the Facility to ask the appropriate claims contact person at the member company either to provide the appropriate documentation or to reverse the earlier reimbursement of that payment[.]"

"It is for the agency, not a reviewing court, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence[,] if any." *Carroll*, 358 N.C. at 674, 599 S.E.2d at 904 (alteration in original) (internal quotation marks and citations omitted). To the extent contradictions exist in the evidence pertinent to Finding of Fact 13, the Hearing Officer, acting on behalf of the Commissioner, weighed the evidence, assessed witness' credibility, and drew inferences thereon to resolve those factual conflicts. *Id.*

The Hearing Officer's resolution of the material conflicts in the evidence has a rational basis in the evidence presented. The testimony of Edith Davis affirmatively states the practice of the Facility's auditor was to ask a member company to either provide claim documentation or reverse the transaction. Substantial evidence supports Finding of Fact 13. Discovery's argument is overruled.

Discovery additionally argues record evidence does not support Conclusion of Law 13. We disagree.

Conclusion of Law 13 states:

> The Facility did not discover the fraudulent conduct of Discovery's employee Steed before 5 November 2011,

and the Facility could not reasonably have discovered his fraud before that date.

Findings of Fact 7 through 11, and 16 through 19, none of which are challenged by Discovery on appeal, constitute substantial evidence to support this conclusion of law. "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 (citations omitted).

Those Findings of Fact are:

7. Before 5 November 2011, neither the Facility nor any person at Discovery other than Steed was aware of Steed's fraudulent conduct.

8. Steed issued at least 936 fraudulent checks between 1 January 2005 and 5 November 2011 for a total sum exceeding $5,200,000.00, which payments were actually paid to Steed and/or a number of co-conspirators involved in his fraudulent scheme. Of that total, Discovery submitted $1,347,168.55 to the Facility for reimbursement, and obtained reimbursement from the Facility for fraudulent claim payments in the amount of $1,347,168.55. During the normal course of operations in responding to Facility questions on its routine, random claims audit process, Discovery reversed one or more of the payments that resulted from Steed's fraudulent claims activities, and one such reversal had been inadvertently included in this total. Thus at the time of the decision of the Board here at issue, the Facility had reimbursed to Discovery the net amount of $1,340,921.25 for payments that had been confirmed to be fraudulent payments.

9. Each year [the] Facility receives and processes approximately $675,000,000 in claims from its member companies. On average during the Relevant Timeframe, Discovery reported approximately $13,500,000.00 in annual claims payments.

10. The Facility has a small audit staff that performs various different types of audits on the motor vehicle liability insurance policies ceded to it by its member companies. The audits include, among others, premium audits, recoupment audits, and claims audits. For claims audits,

the Facility audits 10 to 20 claim files from each member company each year. This typically means that the Facility audits a very small percentage of the claim payments submitted for reimbursement by member companies each year. Discovery, for example, reports in excess of 6,000 loss transactions to the Facility on an annual basis.

11. The claim files selected for audit are generally randomly selected. The items checked during a typical claims audit include whether the policy was eligible for cession; whether the policy was properly ceded; whether the policy included coverage for the vehicle involved in the claim; whether the accident occurred during the period the policy was ceded to the Facility; whether the claim file included appropriate documentation for the claim payment; and whether any salvage and subrogation had been properly handled and reported to the Facility.

. . . .

16. Discovery has identified a small number of fraudulent claim payments by Steed that occurred in claim files that happened to have been audited by the Facility and that were questioned by a Facility claims auditor due to the lack of appropriate documentation in the claims file.

17. Steed was designated by Discovery as the person to whom the Facility was directed to communicate regarding any claim-related issues, including questions relating to claim audits.

18. On each of the small number of occasions that a Facility auditor requested documentation for the payments that ultimately were determined to be fraudulent, Steed advised the Facility that these claim payments had been submitted inadvertently because of an administrative error and that Discovery would reverse the charges. During and before the Relevant Timeframe, Facility claims auditors also requested documentation of claim payments from Steed on numerous claims that were not fraudulent which requests resulted in Discovery's reversal of reimbursements for similar reasons.

19. The rate at which Facility auditors encountered documentation errors and reversals of charges based on the

> inadvertent submission of payments to the Facility by Discovery was not out of proportion to the rate of such errors among other similarly situated member companies.

Unchallenged findings of fact support the Commissioner's Conclusion of Law 13. *See Hershner v. N.C. Dep't of Admin.*, 232 N.C. App. 552, 553, 754 S.E.2d 847, 848 (2014) ("Where unchallenged findings of fact support the decisions of the administrative law judge . . . the trial court did not err in adopting their findings of fact and conclusions of law."). Discovery's arguments contesting the Commissioner's Findings of Fact 12 and 13 and Conclusion of Law 13 are without merit and are overruled.

D. The Doctrine of "Unclean Hands" Bars Discovery's Equitable Defenses

[4] Discovery argues the Commissioner erred in concluding Discovery's appeal of the Board's decision is not a civil action and equitable doctrines of estoppel and ratification do not apply. Discovery asserts the Facility is estopped from seeking repayment for the fraudulent claims at issue, the Facility ratified Steed's fraudulent conduct, and Discovery should not be required to repay the reimbursed sums at issue under general equitable principles. We disagree.

The Commissioner made the following relevant Conclusions of Law:

> 16. Because this is not a civil action, common law doctrines, including the doctrines of estoppel, ratification, and general equitable relief are not applicable to this statutory appeal.
>
> 17. Even if this was a civil action, the doctrines of estoppel, ratification, and general equitable relief would not preclude the Facility from requiring repayment by Discovery of previously reimbursed fidelity losses.

"Equity is for the protection of innocent persons and is a tool used by the court to intervene where injustice would otherwise result. *See Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964) (only innocent persons may claim the benefit of equitable estoppel)." *Swan Quarter Farms, Inc. v. Spencer*, 133 N.C. App. 106, 110, 514 S.E.2d 735, 738, *disc. review denied* 350 N.C. 850, 539 S.E.2d 651 (1999).

> In determining whether the doctrine of estoppel applies, "the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less

> than the party sought to be estopped must conform to fixed standards of equity." *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 177, 77 S.E.2d 669, 672 (1953). The essential elements of equitable estoppel relating to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. *Hawkins*, 238 N.C. at 177-78, 77 S.E.2d at 672. The elements relating to the party claiming estoppel are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. *Id.*
>
> . . . .
>
> A party cannot rely on equitable estoppel if it "was put on inquiry as to the truth and had available the means for ascertaining it." *Hawkins*, 238 N.C. at 179, 77 S.E.2d at 673 (citation omitted).

Wade S. Dunbar Ins. Agency, Inc. v. Barber, 147 N.C. App. 463, 470, 556 S.E.2d 331, 336 (2001). "[H]e who comes into equity must come with clean hands; otherwise his claim to equity will be barred by the doctrine of unclean hands." *Hurston v. Hurston*, 179 N.C. App. 809, 814, 635 S.E.2d 451, 454 (2006).

Discovery asserts the equitable doctrines of estoppel, ratification, and quasi-estoppel bar the Facility from seeking repayment of the fraudulent claims previously reimbursed by the Facility. *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881 (2004) (recognizing quasi-estoppel as a branch of equitable estoppel); *Pittman v. Barker*, 117 N.C. App. 580, 591, 452 S.E.2d 326, 332, ("[E]quitable defenses . . . [include] estoppel, laches, ratification, and waiver[.]"), *disc. review denied* 340 N.C. 261, 456 S.E.2d 833 (1995).

Presuming, *arguendo*, that Discovery is correct in asserting common law equitable principles are applicable here, Discovery cannot claim the benefit of equitable defenses because of the doctrine of unclean hands.

Discovery argues the Facility is estopped from denying the legitimacy of the reimbursements paid to Discovery caused by Steed's fraud, because the Facility through its claims audit process did not discover Steed was committing fraud.

The Facility's Standard Practice Manual mandates "[m]ember companies shall obtain claimant confirmation on a reasonably representative number of claim payments on Facility ceded business." Discovery represented in annual Internal Control Questionnaires submitted to the Facility it had proper internal control procedures in place designed to detect fraudulent activity. The record shows Stuart Lindley, the President of Discovery, provided verbal information to the Facility Board indicating that:

> At no time during the period 2005 through 2011 did Discovery have in place any internal audit procedure designed to routinely or randomly audit claims files under the management or control of Steed, nor any process to verify that claims checks generated by Steed were for payment of legitimate claims . . . .

Discovery cannot be heard to argue the Facility is precluded from seeking reimbursement for the fraudulent claim payments because the Facility allegedly did not follow its claims audit process. The record evidence shows Discovery itself was in violation of its duty under the Standard Practice Manual to "obtain claimant confirmation on a reasonably representative number of claim payments."

As between two innocent parties, the party who put the individual in a position to commit the fraudulent conduct, and failed to reasonably supervise his actions, should bear the loss. *Johnson v. Schultz*, 364 N.C. 90, 93, 691 S.E.2d 701, 704 (2010) (citations omitted). Even if common law principles do apply in this case, Discovery itself would be liable and bear the loss for the fraudulent activity of its employee, Steed.

> The general rule is that a principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority from the principal, even though the principal did not know or authorize the commission of the fraudulent acts . . . .

Parsons v. Bailey, 30 N.C. App. 497, 501, 227 S.E.2d 166, 168 (1976) (citations and quotation marks omitted). "It makes no difference that the agent was acting in his own behalf and not in the interests of the principal when the fraudulent act was perpetrated unless the third parties had notice of that fact." *Id.* at 501-02, 227 S.E.2d at 168 (citations omitted).

Based upon the Commissioner's undisputed Finding of Fact 7, "Before 5 November 2011, neither the Facility nor any person at Discovery other than Steed was aware of Steed's fraudulent conduct." Therefore, Discovery did not have notice Steed was acting on his own behalf. *See id.* It is undisputed that Steed committed fraud in filing fraudulent claims under his authority to manage claims on behalf of Discovery. Even though Discovery "did not know or authorize" Steed's fraud, as his employer it would still be responsible for Steed's fraud under common law principles. *See id.* at 501, 227 S.E.2d at 168.

Based on Discovery's unclean hands, attributable to its responsibility for Steed's fraud under common law principles, the Commissioner did not abuse his discretion in determining "estoppel, ratification, and general equitable relief would not preclude the Facility from requiring repayment by Discovery of previously reimbursed fidelity losses." Discovery's arguments are overruled.

E. The Commissioner Did Not Err by Denying Pre-Hearing Discovery

[5] Discovery asserts the Commissioner erred in ordering that the parties had no right to formal discovery. Discovery argues it should have been allowed to conduct pre-hearing discovery prior to the appeal hearing before the Commissioner. We disagree.

Discovery cites N.C. Gen. Stat. § 58-2-50, governing hearings before the Commissioner, in support of its argument. This statute provides, in relevant part:

> All hearings shall, *unless otherwise specially provided*, be held in accordance with this Article and Article 3A of Chapter 150B of the General Statutes and at a time and place designated in a written notice given by the Commissioner to the person cited to appear.

N.C. Gen. Stat. § 58-2-50 (emphasis supplied). N.C. Gen. Stat. § 150B-39 provides for the right of pre-hearing discovery.

Contrary to Discovery's assertion that N.C. Gen. Stat. § 58-2-50 governs the hearing before the Commissioner, the proceedings before the Commissioner are specifically governed by N.C. Gen. Stat § 58-37-65. N.C. Gen. Stat § 58-37-65 states, in relevant part:

> (a) . . . any member of the Facility and any agent duly licensed to write motor vehicle insurance, may request a formal hearing and ruling by the Board of Governors of the Facility on any alleged violation of or failure to comply with the plan of operation or the provisions of this Article or any alleged improper act or ruling of the Facility directly affecting him as to coverage or premium or in the case of a member directly affecting its assessment . . . .
>
> (b) Any formal ruling by the Board of Governors may be appealed to the Commissioner by filing notice of appeal with the Facility and Commissioner within 30 days after issuance of the ruling.
>
> . . . .
>
> (f) All rulings or orders of the Commissioner under this section shall be subject to judicial review as approved in G.S. 58-2-75.

N.C. Gen. Stat § 58-37-65 (2015).

Because N.C. Gen. Stat § 58-37-65 specifically covers appeals of formal rulings by the Facility Board to the Commissioner, it controls over N.C. Gen. Stat. § 58-2-50. *Trustees of Rowan Tech. v. J. Hyatt Hammond*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) (citations omitted) ("Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability.").

N.C. Gen. Stat. § 58-2-52 provides: "[t]he Commissioner may adopt rules for the hearing of appeals by the Commissioner or the Commissioner's designated hearing officer under . . . § 58-37-65" and "these rules may provide for . . . discovery . . . ." N.C. Gen. Stat. § 58-2-52 (2015). The Commissioner has not adopted any rules providing for formal discovery in an appeal under N.C. Gen. Stat. § 58-37-65.

The only rules adopted by the Commissioner pertaining to the conduct of formal discovery in hearings before the Commissioner are those set forth at 11 N.C.A.C. 1.0401 *et seq*. Those rules apply solely to contested cases governed by N.C. Gen. Stat. § 150B-38 *et seq*. *See* 11 N.C.A.C. 01.0401 (granting party right to appeal in accordance with "Article 3A of G.S. 150B"); 11 N.C.A.C. 01.0414(4) ("Except as otherwise provided by statute, the rules contained in this Section govern the conduct of contested case hearings under Chapter 58 of the General Statutes.")

An appeal under N.C. Gen. Stat. § 58-37-65 is not a contested case within the meaning of N.C. Gen. Stat. § 150B. N.C. Gen. Stat. § 58-2-52(c) (specifying that appeals under N.C. Gen. Stat. §§ 58-36-35, *58-37-65*, 58-45-50, 58-46-30, 58-48-40(c)(7), 58-48-42, and 58-62-51(c) are not contested cases within the meaning of N.C. Gen. Stat. § 150B (emphasis supplied)).

N.C. Gen. Stat. § 58-37-65 is the specific statute controlling over N.C. Gen. Stat. § 58-2-50. This statute does not provide for formal discovery for this hearing and the Commissioner has not promulgated any rules providing for formal discovery under N.C. Gen. Stat. § 58-2-52. The Hearing Officer did not err in concluding the parties were not entitled to conduct formal discovery. Discovery's argument is overruled.

F. The Decision of the Facility Board to Issue the Supplemental Account Activity Statement is Not Before this Court

[6] Defendant contends the Facility was without authority to issue the letter and attached Supplemental Account Activity Statement on 16 December 2013. However, Discovery did not appeal the 16 December 2013 decision of the Facility to issue the letter and Supplemental Account Activity Statement pursuant to N.C. Gen. Stat. § 58-37-65(b). Because Discovery never appealed the decision of the Facility to issue the letter and Supplemental Account Activity Statement, the Commissioner correctly concluded the 16 December 2013 action of the Facility was not properly before him. The 16 December 2013 action was not the subject of judicial review at the superior court and is not properly before this Court. This argument is dismissed.

VI. Conclusion

After review of the Commissioner's order and the superior court's review, we hold the order reflects a rational consideration of the evidence. The evidence in the record supports the Commissioner's findings of fact, which in turn support the ultimate conclusions of law.

This Court does not review the Commissioner's determinations concerning resolutions of conflicting evidence, credibility of the witnesses, or the weight to be given their testimony. Rather, we review whether competent evidence in the whole record supports those findings. The order of the superior court, which affirmed the Commissioner's decision, is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

GREEN v. GREEN

[255 N.C. App. 719 (2017)]

JENNIFER CLELAND GREEN, PLAINTIFF
v.
STANLEY BOYD GREEN, DEFENDANT

No. COA16-1102

Filed 3 October 2017

1. Divorce—equitable distribution—contingency fee—cannot be both divisible property and deferred compensation

For equitable distribution purposes, a contingent fee received by defendant's law firm in a case that began before separation and ended after separation could not be both divisible property and deferred compensation.

2. Divorce—equitable distribution—contingency fee received by defendant—not deferred compensation

A contingency fee received by defendant and his law firm was not deferred compensation where the contract was entered into during the marriage but the fee was not collected until after the date of separation. The General Assembly did not intend to include contingency fees in the term "deferred compensation" in N.C.G.S. § 50-20(b)(1). Even if the fee had been properly classified as deferred compensation, it would have been calculated as of the date of the separation and defendant was not entitled to any payment for his or his firm's work at that time because the case had not been settled.

3. Divorce—equitable distribution—defendant's contingency fee—separate property

The trial court erred in an equitable distribution case by determining that defendant's compensation from his law firm in a contingency fee case was divisible property. Defendant did not acquire any right to receive any income from the contingency fee case prior to the parties' separation. Moreover, the contingency fee contract was between the law firm and the client, not defendant and the client, and the compensation was appropriately labeled the separate property of defendant.

4. Divorce—equitable distribution—mortgage debt not distributed

The trial court did not not abuse its discretion in an equitable distribution case when distributing mortgage debt by not ordering plaintiff to remove defendant's name from the promissory note and deed of trust for the marital residence. Defendant did not argue to

the trial court that his name be removed for the note and deed of trust. Even assuming the issue was not waived, defendant cited no authority requiring a trial court to order a party receiving the marital home to refinance the debt to have the other party removed from the note and deed of trust. The trial court took all of the relevant factors into account and determined that defendant was to assume responsibility for paying the existing mortgage on the residence.

5. Divorce—equitable distribution—liquid assets—evidence sufficient

The trial court did not err in an equitable distribution action by ordering an unequal distribution of marital property where there was plenary evidence in the record that defendant had sufficient liquid assets to pay the distributive award. The trial court's statement that the presumption of an in-kind distribution was not rebutted was harmless error because the trial court proceeded to find that an in-kind distribution was impractical and thus rebuttable.

6. Divorce—alimony—amount—current income—findings

An alimony order was reversed and remanded where it contained findings of defendant's gross monthly income for prior years and the average gross monthly income defendant listed in his affidavit, but contained no ultimate finding establishing defendant's income at the time the award was made.

Judge TYSON concurring.

Appeal by Defendant from judgment and order entered 22 February 2016 and 2 March 2016 by Judge Lillian B. Jordan in District Court, Forsyth County. Heard in the Court of Appeals 15 May 2017.

Bell, Davis & Pitt P.A., by Robin J. Stinson, for Plaintiff-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for Defendant-Appellant.

McGEE, Chief Judge.

Stanley Boyd Green ("Defendant") appeals from an equitable distribution order and judgment that, *inter alia*, classifies compensation he received as a part owner of a law firm as "deferred compensation," and thus divisible property pursuant to N.C. Gen. Stat. § 50-20. Defendant also appeals from an alimony order and judgment requiring him to pay

$6,000.00 per month in alimony to his former wife, Jennifer Cleland Green ("Plaintiff"). We reverse the alimony order and portions of the equitable distribution order, and remand for further proceedings.

I. Background

Plaintiff and Defendant married on 22 October 1994 and had four children together. Plaintiff and Defendant separated on 25 June 2013. Plaintiff graduated from law school in 1992 and worked as a law clerk at the North Carolina Court of Appeals for two to three years. Defendant graduated from law school after the parties were married, clerked for one year at the North Carolina Court of Appeals, and was then hired by the Womble Carlyle Sandridge & Rice law firm in Winston-Salem in 1999. Prior to the parties' separation, Plaintiff had not worked outside the home since the birth of their first child in 1995, except for a few weeks writing subrogation letters early in the couple's marriage. The parties agreed in 2000 that Plaintiff's law license would become inactive, and Plaintiff has spent the last twenty years caring for their children. After the parties separated in 2013, Plaintiff was employed part-time and earned a net income of $1,505.98 per month.

Defendant joined the firm of Strauch, Fitzgerald and Green ("the firm") as a founding partner in 2009 where Defendant was initially a twenty-five percent shareholder. By the date of separation, Defendant was a 26.32 percent shareholder and, after the date of separation, he became a forty percent shareholder when one of the partners left the firm.[1] The firm is a Subchapter C corporation and, as such, shareholders are paid only when there are profits from which to pay them.

In 2009, Jack Strauch ("Strauch") brought to the firm a contingency fee case, that arose out of a contract dispute from the 2010 Vancouver Winter Olympics. The firm represented Cruise Connections, a U.S. corporation based in Winston-Salem, against the Royal Canadian Mounted Police (the "*Cruise* case"). Though the *Cruise* case had already been dismissed by the federal district court at the time the case was brought to the firm, Defendant assisted Strauch with developing arguments on appeal, and the firm obtained a reversal in the *Cruise* case in April 2010. *See generally Cruise Connections Charter Mgmt. 1, LP v. Attorney General of Canada*, 600 F.3d 661 (D.C. Cir. 2010).

1. The firm was subsequently renamed Strauch, Green and Mistretta.

After Plaintiff and Defendant separated, the firm obtained summary judgment on liability in the *Cruise* case. Defendant, Strauch, and others in the firm worked with experts, drafted pre-trial memoranda, developed motions in *limine*, and participated in the damages trial. The firm obtained a $19.1 million verdict for its client at trial. While the matter was on cross-appeal, the *Cruise* case settled in mediation for $16.9 million in December 2014. The settlement yielded the firm a fee of $5,492,500.00.

Although the *Cruise* case was a contingency case, the firm kept detailed billing records that showed members of the firm had worked 6,608 total billable hours on the case. The hours logged prior to the separation of Plaintiff and Defendant totaled 5,159, being seventy-eight percent of the total billed hours. On 13 March 2015, under the firm's compensation structure in existence in 2015, Defendant received a payment of $1,909,277.00 from the *Cruise* case. After accounting for taxes, Defendant received $992,844.00 of the *Cruise* case fee.

Plaintiff filed a complaint against Defendant for child custody, child support, divorce from bed and board and injunctive relief on 14 June 2013. Plaintiff filed a second complaint on 2 July 2013 for equitable distribution, alimony, post-separation support, and attorney's fees. Defendant filed an answer and counterclaim in both actions on 21 August 2013. The two actions were consolidated, and the issues of equitable distribution and alimony were tried in January 2016. The trial court entered an equitable distribution judgment and order (the "equitable distribution order") on 22 February 2016, and entered an alimony judgment and order (the "alimony order") on 2 March 2016.

In determining the value of the firm on the date of separation and the current value, the trial court relied on the testimony of Defendant's expert, Betsy Fonvielle ("Fonvielle"), who testified that the most appropriate valuation method was the "capitalized returns" method. Fonvielle testified that the capitalized returns method over-emphasized the impact of the *Cruise* case, so Fonvielle determined Defendant's interest in the current value of the firm by averaging the capitalized return figure with the "direct market data calculation," and determined the current value of the firm to be $409,000.00 (the value the trial court found). The trial court also found that Defendant's interest in the firm on the date of separation was $314,476.00. It further determined that the $94,524.00 difference between the current value of Defendant's interest and the value of Defendant's interest on the date of separation was a "passive" increase and therefore divisible property subject to equitable distribution. The trial court also found as fact that $636,575.00 of the income Defendant received from the *Cruise* case was "divisible property" and constituted

"deferred compensation."[2] The trial court ordered half of that amount ($318,287.50) to be paid to Plaintiff.

The total marital estate was valued at $1,464,407.38. Pursuant to the equitable distribution order, Plaintiff was ultimately awarded fifty-three percent of the total marital estate, being $776,135.91, which included the payment from the *Cruise* case compensation and a $154,076.57 distributive award. The marital home, with a net value of $41,867.26 after accounting for appreciation in the home and subtracting the mortgage still due on the home, was also distributed to Plaintiff as sole owner. The mortgage balance on the marital residence was $368,448.74 and was distributed to Plaintiff. Pursuant to the alimony order, Defendant was ordered to pay permanent alimony of $6,000.00 per month. Defendant appeals.

II. Analysis

Defendant argues the trial court erred by: (1) classifying the Cruise case compensation as deferred compensation, a type of marital property pursuant to N.C.G.S. § 50-20(b)(1); (2) classifying the *Cruise* case compensation as divisible property pursuant to N.C.G.S. § 50-20(b)(4)(b); (3) incorrectly valuing Defendant's interest in the firm and distributing the post-separation increase in the value of the firm; (4) concluding as a matter of law that the entire increase in value of the firm from the date of separation to the date of distribution was a passive increase, and thus divisible property; (5) failing to order Plaintiff to remove Defendant from the note and deed of trust on the marital home; (6) ordering an unequal distribution funded by a distributive award where there was no evidence Defendant had the liquid funds and ability to pay the distributive award or that the presumption of an in-kind distribution was rebutted; and (7) determining the amount of alimony to be awarded to Plaintiff, and Defendant's ability to pay that amount.

A. *Classification of the Cruise Case Compensation*

[1] Defendant argues the trial court erred by classifying the income he received from the firm as a result of the *Cruise* case settlement as both divisible property and deferred compensation.

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2. This amount was calculated by multiplying the net payment to Defendant of $992,844.00 by the percent of work done by the entire firm on the case prior to the separation (78%), being $774,418.00. Defendant's pre-separation ownership interest in the firm (26.32%) was then multiplied by the expected *Cruise* case fee used to determine the date of separation value of the firm using the capitalized returns method ($523,723.00). This number, $137,844.00, was subtracted from $774,418.00, thus calculating "the divisible property portion" of the *Cruise* case fee to be $636,575.00.

> It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Lee v. Lee, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (internal quotations omitted). It is also well settled that "[q]uestions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." *In re Summons of Ernst & Young*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted).

Pursuant to N.C. Gen. Stat. § 50-20, the trial court in an equitable distribution case "shall . . . provide for an equitable distribution of the marital property and divisible property between the parties[.]" N.C. Gen. Stat. § 50-20(a) (2015). As relevant here, marital property includes "all vested and nonvested pension, retirement, and other deferred compensation rights[.]" N.C.G.S. § 50-20(b)(1) (2015). Divisible property, as relevant to the present case, is defined as:

> all real and personal property [including] [a]ll property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

N.C. Gen. Stat. § 50-20(b)(4)(b) (2015).

In the equitable distribution order in the present case, the trial court found as fact that "a portion of the Cruise Case fee received by [Defendant] after the date of separation is *divisible property* separate from the value of [t]he [f]irm and is considered by the [c]ourt as *deferred compensation* for work performed during the marriage." (emphasis added). We initially note that the trial court appears to have found the Cruise case compensation to be both divisible property, pursuant to N.C.G.S. § 50-20(b)(4)(b), and deferred compensation, a type of marital property pursuant to N.C.G.S. § 50-20(b)(1). The "classification of property in an equitable distribution proceeding requires the application of legal principles," and we therefore review *de novo* the classification of property as marital, divisible, or separate. *Romulus v. Romulus*, 215

N.C. App. 495, 500, 715 S.E.2d 312 (2011) (citation omitted). The *Cruise* case compensation cannot be both marital and divisible property and, as such, we inquire separately into whether the income is appropriately classified as deferred compensation or divisible property.

1. Deferred Compensation

[2] The present case represents the first occasion North Carolina Courts have had to consider whether a contingent fee, collected after the date of separation but where the contract under which the contingent fee was earned was entered into during a marriage, qualifies as "deferred compensation" for the purposes of equitable distribution under N.C.G.S. § 50-20(b)(1). We first consider the text of the statute, which provides that "[m]arital property includes all vested and nonvested pension, retirement, and other deferred compensation rights." N.C.G.S. § 50-20(b)(1). The statute does not define the term "deferred compensation," and we therefore must employ methods of statutory construction in order to discern the intent of the General Assembly in drafting the statute. *See Stevenson v. Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972) ("The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute.").

One cannon of statutory construction employed by our Courts is *ejusdem generis*, which states that "where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." *State v. Fenner*, 263 N.C. 694, 697-98, 140 S.E.2d 349, 352 (1965); *see also Knight v. Town of Knightdale*, 164 N.C. App. 766, 769, 596 S.E.2d 881, 884 (2004). Applying the cannon to the present case, we discern that the General Assembly meant for "deferred compensation," a general phrase, to include only items "of the same kind" as those words which come before it in N.C.G.S. § 50-20(b)(1). We do not believe a spouse's share of a contingent fee earned by virtue of the spouse's ownership interest in a law firm is "of the same type" as vested and nonvested pensions and retirement accounts, which suggests the General Assembly did not mean to include contingency fees to be included in the term "deferred compensation" in N.C.G.S. § 50-20(b)(1).

Also considering dictionary definitions leads to the same result. A contingent fee is defined as "[a] fee charged for a lawyer's services *only if* the lawsuit is successful or is favorably settled out of court." Black's Law Dictionary 338 (8th ed. 2004) (emphasis added). Deferred

compensation, on the other hand, "generally refers to money which, *by prior arrangement*, is paid to the employee in tax years *subsequent* to that in which it is earned." Michael J. Canan, *Qualified Retirement and Other Employee Benefit Plans* § 1.6 (West 1994) (emphasis added); *see also* Black's Law Dictionary 421 (6th ed. 1990) (defining "deferred compensation" as "compensation that will be taxed when received and not when earned"). Defendant received the *Cruise* case fee only after the lawsuit was favorably settled out of court, and Defendant received the income in the year in which it was earned and after the date of the parties' separation.

"[A]s a general matter, retained earnings of a corporation are not marital property until distributed to the shareholders." *Allen v. Allen*, 168 N.C. App. 368, 375, 607 S.E.2d 331, 336 (2005). "[F]unds received after the separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation[.]" *Hill v. Hill*, __ N.C. App. ___, ___, 781 S.E.2d 29, 40 (2015) (quotation omitted). Because the *Cruise* case had not been settled at the time of the parties' separation, Defendant had no right to any income from the *Cruise* case at that time.

Even if the *Cruise* case compensation was properly classified as deferred compensation, under N.C.G.S. § 50-20.1(d), an award of deferred compensation is based on the accrued benefit calculated as of the date of separation. In the present case, Defendant had no accrued benefit at the date of the parties' separation – Defendant was not entitled to any payment from his or the firm's work on the *Cruise* case that had not yet been settled and would not be settled until months after the parties separated.

In *Musser v. Musser*, 909 P.2d 37 (Okla. 1995), the Oklahoma Supreme Court confronted the precise question we confront in this case: whether a husband's interest in a contingency fee case was marital property. In holding it was not, that court stated:

> [A]n attorney is not entitled to receive payment for services rendered unless the client succeeds in recovering money damages. For this reason, we conclude that because [the h]usband in the case at bar is not certain to receive anything under the contingency fee contracts, those contingency fee cases should not be considered marital property. At most, [the h]usband has a potential for earning income in the future. He is not assured of earning anything for his efforts nor does he acquire a vested interest in the income

> from those cases unless his client recovers, an event impossible to accurately predict. Therefore, we deem pending contingency fee cases of a law firm to be future income and not a part of the marital assets.

Id. at 40 (emphasis omitted). We agree with the reasoning of the Oklahoma Supreme Court. At the time Plaintiff and Defendant separated, Defendant and the firm were not certain to recover anything from the *Cruise* case. At most, Defendant had the potential to earn income from the case in the future. Therefore, the *Cruise* case compensation was not deferred compensation.

2. Divisible Property

[3] In addition to classifying the *Cruise* case compensation as deferred compensation, the trial court also classified it as divisible property. As noted, divisible property

> means all real and personal property [including] [a]ll property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

N.C.G.S. § 50-20(b)(4)(b). Plaintiff argues the *Cruise* case compensation received by Defendant after the date of separation is divisible property because, pursuant to N.C.G.S. § 50-20(b)(4)(b), divisible property includes contractual rights. Plaintiff argues that the rights under the *Cruise* contingent fee contract "are divisible property to the extent of pre-separation labor pursuant to the contract." As explained above, however, Defendant did not acquire any right to receive income from the *Cruise* case prior to the date of the parties' separation. In addition, the contingency fee contract was between the firm and its client, not between Defendant and the client. Plaintiff provides no case law, and we have found none, holding that legal fees earned on a contingency basis should be considered under the contractual rights clause of N.C.G.S. § 50-20(b)(4)(b).

On appeal, Plaintiff raises a new argument not considered by the trial court as to why the *Cruise* case compensation was properly classified as divisible property. Plaintiff argues the *Cruise* case compensation is appropriately considered a bonus, making it a type of divisible property pursuant to N.C.G.S. § 50-20. "A bonus is something given in addition to

what is ordinarily received by, or strictly due to, the recipient." *Pugh v. Scarboro*, 200 N.C. 59, 62, 156 S.E.2d 149, 150 (1930); *see also* BLACK'S LAW DICTIONARY 194 (8th ed. 2004) (defining "bonus" as "[a] premium paid in addition to what is due or expected"). The income Defendant received from the *Cruise* case was not a premium paid to the firm in addition to the money that was due to it; rather, the *Cruise* case compensation was the compensation Defendant received by virtue of his ownership interest in the firm. The trial court erred in determining that the *Cruise* case compensation was divisible property, and that compensation is thus appropriately labeled as separate property of Defendant.

Given our determination that the *Cruise* case compensation is separate property, we decline to address Defendant's remaining arguments regarding the *Cruise* case compensation, including whether the trial court appropriately found that the increase in the firm's value was "passive" and therefore divisible pursuant to N.C.G.S. § 50-20(b)(4)(a). In viewing the *Cruise* case compensation as separate property, on remand the trial court will consider anew whether there was an increase in the firm's value and, if so, again consider whether that increase was "passive" or "active." We express no opinion on the matter, and leave it to the trial court's determination.

B. *Distribution of the Mortgage Debt*

[4] Defendant argues that the trial court erred by failing to distribute the mortgage debt to Plaintiff by not ordering Plaintiff to remove Defendant's name from the promissory note and deed of trust for the marital residence. We first note that Defendant never requested that the trial court order Plaintiff to refinance the existing mortgage, and offered no evidence that Plaintiff had the ability to refinance the existing mortgage in her name alone. Because Defendant failed to argue to the trial court that his name must be removed from the note and deed of trust, he has waived appellate review of the issue. *See, e.g.*, *Bowles Auto., Inc. v. NC DMV*, 203 N.C. App. 19, 29, 690 S.E.2d 728, 734 (2010) (holding that an appellant "waived appellate review" of an issue due to its failure to raise that issue at trial).

Even assuming the issue was not waived, we hold that the trial court did not fail to distribute the mortgage debt.

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result

> of competent inquiry, or a finding that the trial judge failed to comply with the statute will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

Defendant cites *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000), which states that "the [trial] court must distribute the marital property and debts." *Id.* at 557, 537 S.E.2d at 849. Since Defendant's name remains on the note and deed of trust, Defendant argues, he would be liable should Plaintiff fail to pay the mortgage. We hold that the trial court did not abuse its discretion in ordering Plaintiff to pay the note and deed of trust, but not ordering Plaintiff to have Defendant's name removed from those documents and secure a new loan in her name only. We find no merit in Defendant's argument that the trial court failed to distribute the mortgage debt as part of the equitable distribution judgment. The trial court clearly distributed the debt owed on the marital home to Plaintiff. Finding of fact 34 of the trial court's order states that "[t]he . . . mortgage on the marital residence . . . had a balance of $364,448.74 on the date of separation. This debt is distributed to [Plaintiff]."

While Defendant argues that the trial court erred by failing to distribute the mortgage debt at all, he actually takes issue with the method in which the mortgage debt was distributed. But Defendant has failed to make that argument in his brief to this Court. In his brief, Defendant only argues that the trial court "in actuality . . . failed to" distribute the mortgage to Plaintiff, although it "found it was distributing the mortgage to Plaintiff." Therefore, any argument that the trial court erred in the *method* in which it distributed the mortgage debt was abandoned by Defendant's failure to raise it in his brief. N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

Even if the issue were not abandoned, Defendant cites no authority requiring that a trial court order a party receiving the marital home in an equitable distribution action to refinance the mortgage debt to have the other party removed from the note and deed of trust. In the present case, the trial court heard testimony about the valuation of the marital residence at the time it was purchased in 2006, as well as the valuation of the residence at the time of separation. The trial court also heard testimony regarding the remaining balance on the mortgage at the time of trial, and the monthly mortgage payment for principal, interest, taxes, and insurance.

The trial court's order clearly shows that it took these factors into account in distributing the marital property and debts. The equitable distribution order includes a lengthy discussion of the marital property, including the differing valuations of the property, each parties' contentions about the valuations, and the balance of the mortgage. The trial court then specifically ordered that "[t]he marital residence [is] distributed to [] Plaintiff," and that Plaintiff was "distributed a net value of $41,867.26," which took into account the remaining balance on the mortgage.

The order also mandated that Plaintiff "shall assume and pay in full according to the terms *of the present mortgag*e at Wells Fargo Mortgage that is a lien on [the marital residence] until such time as she sells the residence or refinances it." (emphasis added). This portion of the order demonstrates that the trial court took all of the relevant factors into account and determined that Plaintiff was to assume the responsibility to pay the already existing mortgage on the residence, rather than obtain a new mortgage. The record, transcript, and order combine to show that: (1) Defendant never requested the trial court order Plaintiff to refinance the mortgage; (2) Defendant did not offer any evidence that Plaintiff had the financial resources to do so; (3) the trial court's order included a notation that Plaintiff had made all payments on the existing mortgage as of the date of the order; and (4) the trial court carefully considered the evidence regarding the marital home and the mortgage; thus, we decline to hold that the trial court's decision "could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). "[E]quitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion." *Adams*, 331 N.C. at 691, 417 S.E.2d at 451 (citations omitted). We hold the trial court did not abuse its discretion in distributing the mortgage debt.

C. A*vailable Liquid Funds for the Distributive Award*

[5] Defendant next argues the trial court erred by ordering an unequal distribution of marital property because there was no evidence that he had the liquid funds and ability to pay the distributive award. We disagree. When a distributive award is ordered, the court must "make the required findings that defendant had sufficient liquid assets from which to pay the distributive award." *Squires v. Squires*, 178 N.C. App. 251, 267, 631 S.E.2d 156, 165 (2006). "If a party's ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed." *Peltzer v. Peltzer*, 222 N.C. App. 784, 791, 732

S.E.2d 357, 362 (2012). In the present case, there is plenary evidence in the record that Defendant had sufficient liquid assets to pay the distributive award. The trial court found that Defendant had separate assets[3] which were valued at over $276,500.00, in addition to a whole life insurance policy with a face value of $1,275,000.00, and an investment portfolio with Northwestern Mutual with a balance of $1,275,268.80.

Defendant further argues that there was no evidence that the presumption of an in-kind distribution was rebutted.

> It shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, *or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind*. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

N.C. Gen. Stat. § 50-20(e) (emphasis added). In the present case, the presumption is rebuttable because Defendant's interest in the firm is a closely-held business interest, and the trial court found that, due to the nature of some of the marital property, it was impractical for an in-kind distribution. While the trial court specifically referred to the presumption as "not rebutted," we find the trial court's statement is harmless error because the court proceeded to find that an in-kind distribution was impractical and thus rebuttable under the statute. We affirm the trial court's determination that the distribution was not susceptible to division in-kind, and that Defendant had sufficient liquid assets to pay the distributive award.

D. *Defendant's Ability to Pay Alimony*

[6] Defendant argues that the trial court's findings of fact are insufficient for this Court to review his ability to pay alimony. Whether a spouse is entitled to an award of alimony is a question of law, which we review

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3. These assets include a new home in which he invested $40,000.00, a boat worth $60,000.00 with $10,000.00 equity, 27 guns, 100 knives, and a separate retirement plan worth over $107,000.00.

de novo. *Collins v. Collins*, ___ N.C. App. ___, ___, 778 S.E.2d 854, 856 (2015). "The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in the absence of an abuse of discretion." *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). Defendant contends the trial court failed to make a finding of fact regarding his current actual income – a required finding before using prior years' income to determine whether he had the ability to pay the alimony award.

"Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order." *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (citation and emphasis omitted). As this Court has previously held:

> Unless the [trial] court finds that a supporting spouse is deliberately depressing his income in disregard of his marital obligation to provide reasonable support, and applies the "capacity to earn" rule, a supporting spouse's ability to pay alimony is ordinarily determined by his income at the time the award is made.

Whedon v. Whedon, 58 N.C. App. 524, 527, 294 S.E.2d 29, 32 (1982) (emphasis omitted); *see also Megremis v. Megremis*, 179 N.C. App. 174, 182, 633 S.E.2d 117, 123 (2006) ("Ordinarily, alimony is determined by a party's actual income at the time of the alimony order. It is well-established that a trial court may consider a party's earning capacity only if the trial court finds the party acted in bad faith." (citations omitted)).

In the present case, the trial court made the following findings of fact regarding Defendant's income and ability to pay:

> 24. [Defendant] is one of two owners of his law firm and his gross monthly income in 2014 averaged $24,333.00. In 2015 his monthly income averaged $42,458.00 (excluding a contingency fee payment he received in the Spring of 2015.) His affidavit lists his average gross monthly income as $23,280.00. Using the averages on his end of year income statements for 2014 and 2015 for mandatory deductions, the [c]ourt finds that his average gross monthly income for 2014 and 2015 was $33,395.00 His average monthly mandatory deductions were $14,012.00 and his net wages were $19,383.00.
>
> 25. [Defendant] has an investment account at Northwestern Mutual that had an investment total as

> of December 16, 2015 of $1,275,268.80. The parties stipulated that $916,433.00 is owed in federal and state taxes on the very large contingency fee [Defendant] received afterthe date of separation which the [c]ourt ruled was part divisible property in the [e]quitable [d]istribution case.
>
> . . . .
>
> 35. The [c]ourt finds that an appropriate gross amount for [Defendant] to pay [Plaintiff] as alimony is the sum of $6,000.00 per month. This sum is reasonable and necessary to provide [Plaintiff] with the funds needed to meet her reasonable needs according to her accustomed standard of living. Defendant has the means and ability to pay alimony of $6,000.00 per month to Plaintiff.
>
> 36. Defendant offered evidence showing, if he earns $330,146.00 annually (as opposed to $400,000.00 annually) if he pays $5300.00 in taxable alimony per month, and he pays $3184.00 per month in child support, he will have $9,304.00 per month to meet his own living expenses.
>
> . . . .
>
> 39. Based upon the factors set forth in [N.C. Gen. Stat. §] 50-16.3A and the [c]ourt's discretion, the award of alimony as ordered herein is equitable under the circumstances of this case.
>
> 40. [Defendant] has the ability to pay the support ordered herein.

While the alimony order contained findings of fact on Defendant's 2014 and 2015 gross monthly income, and found as fact that Defendant's "affidavit lists his average gross monthly income as $23,280.00," the order contained no ultimate finding of fact establishing Defendant's income "at the time the award [was] made."

Plaintiff cites *Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) and *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006), contending that the trial court may "use an average of [the supporting spouse's] prior years' income" when "the trial court does not have sufficient information to determine actual income." While the Court in both *Zurosky* and *Diehl* did use a supporting spouse's prior years' income to

determine whether he had the ability to pay alimony, both of those cases are distinguishable from the present case.

In *Zurosky*, the trial court noted that the supporting spouse reported in his financial affidavits a $16,000.00 monthly deficit between his income and expenses, but "expressed concerns about the credibility of the evidence presented by [the supporting spouse] concerning his income." *Zurosky*, 236 N.C. App. at 230, 763 S.E.2d at 762. Therefore, the trial court "relied on prior years' incomes rather than [the supporting spouse's] testimony concerning" his current actual income. *Id.* In determining the trial court did not err in relying on previous years' incomes, this Court noted several findings of fact in the trial court's order in which the court explained why it "did not find [the supporting spouse's] reported income to be credible[.]" *Id.* at 243, 763 S.E.2d at 769-770.

Similarly, in *Diehl*, the trial court used the supporting spouse's prior years' income because the trial court was not presented with "adequate information as to [the supporting spouse's] actual . . . income" at the time of the order. *Diehl*, 177 N.C. App. at 650, 630 S.E.2d at 31. The trial court found the supporting spouse's representation of his actual income to be "highly unreliable," which forced the trial court to rely on previous years' income. *Id.* at 650, 630 S.E.2d at 30.

In the present case, unlike in *Zurosky* and *Diehl*, the trial court did not make any findings of fact regarding Defendant's current income at the time of the order, but only found as fact that Defendant had submitted an affidavit listing his income as $23,280.00 per month. Even if such findings had been made, the trial court did not base its decision on whether Defendant had the ability to pay alimony with Defendant's current income. Instead, the trial court based that decision on an average of Defendant's two prior years' income. But the trial court did not make findings of fact as to whether Defendant's professed actual income at the time of the order was reliable or unreliable before basing its decision regarding Defendant's ability to pay alimony on an average of prior years' income. Averaging the prior years' income to determine Defendant's ability to pay alimony resulted in a monthly gross income that was $10,115.00 higher than Defendant's reported monthly gross income.[4]

Consistent with this Court's precedents, we hold the trial court abused its discretion in basing its decision regarding Defendant's ability

4. Defendant's average gross monthly income for 2014 and 2015, as found by the trial court, was $33,395.00, while his reported monthly gross income for those years was $23,280.00, for a difference of $10,115.00.

to pay alimony on an average of Defendant's monthly gross income from prior years without first determining Defendant's current monthly income, and whether that reported current income was credible. Accordingly, the alimony order must be reversed. On remand, the trial court must make findings of fact regarding Defendant's "actual income, from all sources, at the time of the order," *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675, and may only use prior years' incomes if the trial court finds as fact that Defendant's actual income is not credible, or is otherwise suspect. *Zurosky*, 236 N.C. App. at 230, 763 S.E.2d at 762; *Diehl*, 177 N.C. App. at 650, 630 S.E.2d at 31.

III. Conclusion

We reverse the trial court's order classifying the *Cruise* case compensation as deferred compensation and divisible property. The *Cruise* case compensation is separate property of Defendant under the circumstances present in this case. This case is remanded for further proceedings regarding equitable distribution. We decline to address Defendant's additional arguments regarding the valuation and distribution of the property related to the firm. Correctly viewing the *Cruise* case compensation as separate property, the trial court should determine anew whether there was an increase in the value of the firm, and whether any such increase was passive or active.

The alimony order is also reversed and remanded for further proceedings, as the trial court must determine Defendant's current actual income before deciding his ability to pay alimony on an average of his income from prior years.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge INMAN concurs.

Judge TYSON concurs with separate opinion.

TYSON, Judge, concurring.

I fully concur to reverse and to remand to the trial court. I agree the contingency compensation proceeds from the *Cruise* case, distributed to Defendant, were not deferred compensation. I also agree the compensation from the *Cruise* case is separate property of Defendant under the circumstances presented here. On remand, the trial court should determine whether there was any increase in value of Defendant's law firm, and whether such increase, if any, was passive or active. I

agree this case should be remanded for further proceedings regarding equitable distribution.

I also concur with the majority's holding and opinion that the alimony order should be reversed and remanded for further proceedings in order for the trial court to determine the amount of Defendant's current actual income. The trial court should do this before deciding his ability to pay alimony based upon the average of his income from previous years.

I write separately to further address Defendant's argument that the trial court's order failed to distribute the mortgage debt on the marital residence to Plaintiff.

A. Distribution of Marital Residence

Defendant argues the trial court failed to distribute the mortgage debt on the marital home to Plaintiff. Defendant argues in his brief: "while the [c]ourt ordered Defendant to deed over his interest in the property to Plaintiff, the trial court did not order Plaintiff to remove Defendant from the note and deed of trust, instead merely allowing her to assume the payments on the mortgage, and thus Defendant remains liable on the marital debt." I also disagree with Defendant's characterization of the trial court's order.

In contrast to Defendant's reading of the order, the decretal portion of the order states, in relevant part:

> 4. Defendant shall execute a special warranty deed transferring all of his right, title and interest in the property located at 2733 Spring Garden Road, Winston Salem, NC to Plaintiff. Plaintiff's attorney shall prepare and deliver to Defendant's attorney said deed conveying Defendant's interest in said property to Plaintiff and Defendant shall execute said deed within fifteen (15) days of receiving the deed from Plaintiff's attorney. The divisible property value of $4,667.00 is also distributed to the Plaintiff. The *Plaintiff shall assume and pay in full* according to the terms of the present mortgage at Wells Fargo Mortgage that is a lien on said residence until such time as she sells the residence or refinances it. (Emphasis supplied.)
>
> . . . .
>
> 13. At the request of the other party, each party shall execute and deliver any and all written instruments or documents reasonably necessary or desirable to effectuate the

purposes and provisions of this Judgment and Order.

. . . .

15. The terms of this Judgment and Order are enforceable through the contempt powers of this court. Each party has the ability to seek enforcement of this Judgment at his or her respective election.

These provisions grant Defendant the authority and an enforcement mechanism to seek his release from liability for the note. That is the only logical reading to comport with the trial court's intent that Plaintiff "shall *assume and pay in full the debt*" on the residence. If Defendant's name remains on the note, then the trial court's intent to distribute the asset and debt in full to Plaintiff and for Plaintiff to "assume and pay in full" the mortgage would be a nullity, because the lender could assert Defendant's joint and several liability to pay the debt in full, if Plaintiff fails to "assume and pay in full." "Court judgments and orders 'must be interpreted like other written documents, not by focusing on isolated parts, but as a whole.' " *Cleveland Const., Inc. v. Ellis-Don Const. Inc.*, 210 N.C. App. 522, 535, 709 S.E.2d 512, 522 (2011) (citing *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986)).

The majority's opinion states and correctly interprets the trial court's order as clearly distributing the debt owed on the marital residence to Plaintiff. Finding of Fact 34 of the order states: "The . . . mortgage on the marital residence . . . had a balance of $364,448.74 on the date of separation. *This debt is distributed to [Plaintiff]*." (Emphasis supplied.) The court's order does not just state Plaintiff shall make payments on the mortgage, while Defendant remains fully liable, but that the ownership of the asset and mortgage debt itself "is distributed to Plaintiff" and expressly requires that Plaintiff "shall assume and pay in full."

" 'To assume' is defined by the lexicographers as 'to take upon one's self,' 'to undertake,' 'to adopt.' " *Lenz v. Chicago & N.W. Ry. Co.*, 111 Wis. 198, 86 N.W. 607, 609 (1901); *see also Proctor Tr. Co. v. Neihart*, 130 Kan. 698, 288 P. 574, 577 (1930) (" 'Assume' means 'to take upon one's self (to do or perform); to undertake.' " (citation omitted)). "To pay, is . . . to discharge a debt, to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged." *Beals v. Home Ins. Co.*, 36 N.Y. 522, 527 (1867) (citations omitted).

Here, the language of the trial court's order expressly distributes the marital residence equity and debt to Plaintiff, and requires Plaintiff "shall assume *and* pay in full" the mortgage and debt on the marital

residence. Construing "assume" and "pay in full" together indicates Defendant has the power under the trial court's order to demand Plaintiff to have Defendant's name removed from the note or otherwise release Defendant from liability on the note. Otherwise, Plaintiff would assume the mortgage, but not be responsible to "pay in full." *See Cleveland Const.*, 210 N.C. App. at 535, 709 S.E.2d at 522 (stating court orders and judgments must be interpreted as a whole).

If any ambiguity exists in the trial court's order, then upon remand, the trial court should make the decretal section more definitive. "Whether ambiguity exists in a court order is a question of law. . . ." *Emory v. Pendergraph*, 154 N.C. App. 181, 185, 571 S.E.2d 845, 848 (2002). This Court reviews questions of law *de novo*. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004).

Upon execution and recordation of the ordered special warranty deed, conveying the marital residence to Plaintiff, all of Defendant's right, title, and interest in that collateral, including his equity of redemption of that property is terminated. As long as Defendant's name remains on the note, he is fully liable for the entire debt. He must disclose that liability on his financial statements and credit reports, with no continuing or offsetting interest in the underlying real property asset, which serves as partial collateral to secure repayment of the debt. Plaintiff and Defendant's joint and several promise to pay remains part of the collateral for repayment.

No cases allow a trial court to purportedly grant one spouse sole ownership of the marital residence, and to distribute responsibility to "assume and pay in full" the mortgage debt, while requiring the other spouse to remain jointly and severally liable for the balance on the note. Our Supreme Court in *Beall v. Beall*, 290 N.C. 669, 677 228 S.E.2d 407, 412 (1976), dealt with a divorce judgment that granted the wife *possession* of the marital residence and required the husband to pay the mortgage and taxes on the home. The Supreme Court found that portion of the divorce order reasonable. *Id.* The Court in *Beall* did not require the husband to *convey his entire property interest* in the marital residence to the wife, yet remain liable for the entire debt.

B. Conclusion

The majority's opinion does not vacate or overturn the portions of the equitable distribution order distributing the marital residence asset and debt to Plaintiff. The order grants Plaintiff exclusive ownership of the marital residence and distributes concurrent responsibility to "assume and pay in full" the debt thereon.

On this marital residence distribution issue, the trial court's decretal portion of its order is supported by its findings of fact and conclusions of law, which allows for Defendant's liability under the note to be terminated or released by the lender upon his execution and delivery of the special warranty deed. The trial court upon remand should enforce the express language of the equitable distribution order to require such release from the martial residence debt liability as a *quid pro quo* for the conveyance of Defendant's entire interest in the marital residence to Plaintiff.

CURTIS R. HOLMES, PLAINTIFF
v.
DAVID G. SHEPPARD AND FARM BUREAU INSURANCE OF NORTH CAROLINA, INC., DEFENDANTS

No. COA17-125

Filed 3 October 2017

1. Insurance—agent—negligence—duty of care—summary judgment

Summary judgment for defendant was not appropriate on a negligence claim against an insurance agent for not obtaining insurance on property without a vacancy exclusion. If a trier of fact were to believe the evidence that plaintiff requested a vacancy exclusion and that defendant sought to obtain a policy based on that request, then defendant undertook a duty to procure such a policy.

2. Insurance—action against agent—policy exclusion—failure to read policy—contributory negligence

In a negligence action against an insurance agent for failure to obtain a property insurance policy without a vacancy exclusion, the admitted failure of plaintiff to read the policy did not necessitate summary judgment on contributory negligence because there were facts which suggested that plaintiff may have been misled or put off his guard by the agent.

3. Insurance—agent—policy—negligent misrepresentation

The trial court did not err by granting summary judgment for an insurance agent on a negligent misrepresentation claim arising from a vacancy exclusion in a property insurance policy. Although there was a dispute about whether the agent provided false information,

plaintiff could have discovered the truth about the policy by reading it. Plaintiff did not allege that he was denied the opportunity to investigate or that he could not have learned the true facts by reasonable diligence.

4. Insurance—action against agent—vacancy exclusion included policy—merger and acceptance

Summary judgment for defendant was not appropriate in an action against an insurance agent for not obtaining a property insurance policy without a vacancy exclusion. Although defendant argued that summary judgment was appropriate because plaintiff received, retained, and thus accepted the policy, this was not an action in which plaintiff sought to hold the insurance company liable for an obligation not in the policy.

5. Appeal and Error—preservation of issues—no objection at trial

A cross-appeal contending that a motion to dismiss provided an alternate basis for relief was not properly before the Court of Appeals where the trial court determined that the issue was moot and defendant did not object.

Appeal by Plaintiff from an order granting summary judgment in favor of Defendants entered 13 September 2016 by Judge Stanley L. Allen in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2017.

The Law Offices of Wade Byrd, P.A., by Wade E. Byrd, for Plaintiff-Appellant.

Teague Rotenstreich Stanaland Fox & Holt, P.L.L.C., by Stephen G. Teague, for Defendants-Appellees.

MURPHY, Judge.

Curtis R. Holmes appeals from the trial court's order granting David G. Sheppard and Farm Bureau Insurance of North Carolina, Inc.'s ("Farm Bureau") (collectively "Defendants") motion for summary judgment as to Holmes's causes of action for: (1) negligence and (2) negligent misrepresentation.[1] On appeal, Holmes argues that the grounds argued

1. The trial court also granted summary judgment in favor of Defendants on Holmes's constructive fraud claim. However, Holmes raises no arguments appealing summary

for granting the motion are either precluded by precedent, disputed by issues of material fact, or both. Specifically, he maintains: (1) the record shows Sheppard owed Holmes a duty of care, which he breached; (2) evidence of misstatements was not needed to establish negligence by an insurance agent, and, nonetheless, the record shows Sheppard misstated the policy's coverage; (3) Holmes's failure to read the policy was not contributory negligence as a matter of law; and (4) Defendants' theory that Holmes accepted the policy by not reading it cannot support summary judgment in this case. Defendants raise an alternative basis in law through North Carolina Rule of Appellate Procedure 10(c), arguing that the claims herein appealed could have been appropriately dismissed on the alternative basis of failure to state claims upon which relief can be granted.

We hold the trial court did not err in granting summary judgment in favor of Defendants on the negligent misrepresentation claim. However, we agree with Holmes that the trial court erred in granting summary judgment on his negligence claim because there is a genuine issue of material fact as to whether Sheppard owed Holmes a duty of care to obtain coverage for the property at issue while it remained vacant. We reverse for Holmes to proceed with the negligence claim, and we reject Defendants' North Carolina Rule of Appellate Procedure 10(c) argument.

Background

Holmes owns various real estate holdings, including both residential and office buildings. Beginning in approximately 2010, Holmes purchased several insurance policies for his properties through Sheppard, an insurance broker and agent of Farm Bureau.

Holmes filed a claim under one of these Farm Bureau policies in November 2011, when eight heat pumps were stolen from an office building that Holmes owned. Farm Bureau denied the claim because there was a vacancy clause on the property ("the 2011 denial"). Nevertheless, Holmes continued to use Sheppard to purchase Farm Bureau insurance policies.

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judgment on the constructive fraud claim in his opening brief. Nonetheless, Defendants address constructive fraud in their appellee brief, and Holmes then raises the issue in his reply brief. We do not allow Holmes to use his reply brief to raise an issue on appeal that was not raised in his principal brief. *See Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 78, 772 S.E.2d 93, 96 (2015) ("[T]his Court has noted that [a] reply brief does not serve as a way to correct deficiencies in the principal brief.") (quotation omitted); *see e.g. State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485 (2014) (holding that where a defendant did not ask the Court of Appeals to review an unpreserved issue under the plain error standard in his principal brief, he could not cure the error by asking the Court to use the plain error standard in his reply brief).

In August 2012, Holmes contacted Sheppard about a newly constructed home he owned on Thom Road in Mebane ("the Property"). Farm Bureau insured the Property until 19 August 2012, when it cancelled the policy due to the Property being vacant. Sheppard claimed that, although Holmes confirmed the Property was vacant, Holmes stated he would lease or rent the Property within thirty days. Holmes disputes that he told Sheppard he would lease the Property.

Sheppard told Holmes that Farm Bureau was unable to insure the Property, and that he would have to insure it through the North Carolina Joint Underwriters Association ("NCJUA"). Holmes testified that he did not know why he had to purchase the policy through NCJUA instead of through Farm Bureau, but thought "it was because the property was vacant." Holmes further claims that he chose to purchase a policy through Sheppard because he felt Sheppard would "be the best man to -- to guide [him] in the right way" in purchasing a policy for the Property because Sheppard knew about the 2011 denial based on vacancy. Holmes testified that although he did not remember the application process for a NCJUA policy, he told Sheppard that he "didn't want to ever have this vacancy problem again because of what [he] had been through."

Following Holmes's application for coverage, NCJUA issued a policy ("the Policy") insuring the Property, which became effective on 24 August 2012. NCJUA mailed a copy of the Policy to Holmes, who received it, but admittedly did not read it. The Policy remained active in January 2015, when water damage occurred at the Property. Holmes contacted Sheppard to submit a claim for the damage, which Sheppard initially thought would be paid. Sheppard claims he thought the Policy covered the damage because he was "under the impression that [Holmes] had fulfilled his commitment to lease the property[.]" Holmes denies ever making a commitment to lease the Property. NCJUA denied the claim due to coverage exclusions and limitations for " 'Accidental Discharge or Overflow of Water or Steam' of a dwelling that had been vacant for more than 60 consecutive days immediately prior to the loss."

On 7 December 2015, Holmes filed a complaint seeking compensatory damages, alleging claims against Defendants for: (1) negligence; (2) negligent misrepresentation; and (3) constructive fraud in connection with the Policy. Defendants denied these allegations in their Answer, asserting various defenses, including a Rule 12(b)(6) motion to dismiss. On 16 August 2016, Defendants filed a motion for summary judgment, and served notice of a motions hearing for both the motion for summary judgment and the motion to dismiss. The hearing took place on 6-7 September 2016. The trial court granted Defendants' motion for

summary judgment as to all claims in open court. The trial court filed its written order on 13 September 2016. The trial court declined to reach the motion to dismiss because the grant of the summary judgment motion rendered the motion to dismiss moot. Plaintiff timely appealed.

Analysis

Holmes argues the trial court erred in granting summary judgment in favor of Defendants on his claims of negligence and negligent misrepresentation because none of the grounds asserted as a basis for summary judgment support the grant of the motion. Specifically, he maintains: (1) the record shows Sheppard owed Holmes a duty of care, which he breached; (2) evidence of misstatements was not needed to establish negligence by an insurance agent, and, nonetheless, the record shows Sheppard misstated the policy's coverage; (3) Holmes's failure to read the policy was not contributory negligence as a matter of law; and (4) Defendants' theory that Holmes accepted the policy by not reading it cannot support summary judgment in this case.

We reverse the trial court's grant of summary judgment on the negligence claim and affirm the trial court's grant of summary judgment as to negligent misrepresentation. We note Defendants invoke North Carolina Rule of Appellate Procedure 10(c) to raise an alternative basis in law supporting the dismissal of Holmes's claims. We find their argument deficient.

We review an order granting summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is only appropriate when the record shows "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* at 523-24, 649 S.E.2d at 385 (quotation omitted).

I. Negligence by an Insurance Agent

Holmes argues the trial court erred in granting summary judgment on his negligence claim. We agree, because whether Defendants owed a duty of care to obtain insurance that would cover the Property while it remained vacant is a genuine issue of material fact to be decided by a jury.

A. Duty of Care

[1] To establish a prima facie case for an insurance agent's negligent failure to procure requested coverage, a plaintiff must "prove the existence of a legal duty owed to the plaintiff by the defendant, breach of

that duty, and a causal relationship between the breach and plaintiff's injury or loss." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 301, 603 S.E.2d 147, 160 (2004) (citation omitted).

It is well established that a duty "to use reasonable skill, care and diligence to procure" contemplated insurance arises, and is breached, "if an insurance agent or broker undertakes to procure for another insurance against a designated risk[.]" *Kaperonis v. Underwriters at Lloyd's, London*, 25 N.C. App. 119, 128, 212 S.E.2d 532, 538 (1975). Thus, the agent or broker will be "liable to the proposed insured for loss proximately caused by" a "negligent failure to" procure such insurance. *Id.* at 128, 212 S.E.2d at 538. "Conversely, if the agent or broker . . . procured the contemplated insurance coverage from a competent, solvent insurer, so that it was in effect at the time of the casualty . . . he has performed his undertaking and is not liable . . . thereon." *Mayo v. Am. Fire & Cas. Co.*, 282 N.C. 346, 353, 192 S.E.2d 828, 832-33 (1972) (citations omitted). If a promise or some affirmative assurance that the broker or agent "will procure or renew a policy of insurance" is given "under circumstances which lull the insured into the belief that such insurance has been effected," then the broker or agent is obligated "to perform the duty which he has thus assumed." *Barnett v. Sec. Ins. Co. of Hartford*, 84 N.C. App. 376, 378, 352 S.E.2d 855, 857 (1987) (quotation omitted).

Here, Holmes claims he requested a policy without a vacancy exclusion. In support of this argument, he points to his deposition testimony, where he repeatedly claimed he told Sheppard he did not want to have another issue because of vacancy, as he did with the 2011 denial. Further, Holmes points to the following exchange that took place at deposition, which he argues demonstrates that he requested coverage without a vacancy exclusion, and that Sheppard undertook to procure such coverage:

> Q. What did [Sheppard] say as to why he had to get insurance with a different company?
>
> [Holmes]: I think it was because the property was vacant.

In contrast, Defendants argue that Holmes never requested a policy without a vacancy limitation. By affidavit, Sheppard testified that Holmes did not request a vacancy exclusion for the Property, but, rather, in August 2012, Holmes confirmed he planned to lease the Property within thirty days. Although, in his deposition, Holmes claimed that Sheppard's statement that Holmes planned to lease the Property was false, Holmes did indicate in his application for the Policy that the Property would be occupied. Sheppard claimed he initially thought

the claim at issue would be paid when it was initially presented because he was under the impression that Holmes had fulfilled the commitment to lease the Property.

If a trier of fact were to believe the evidence that Holmes requested a vacancy exclusion and Sheppard sought to secure a policy based on the request, then Sheppard undertook a duty to procure such a policy. *See Kaperonis*, 25 N.C. App. at 128, 212 S.E.2d at 538 (explaining that the duty "to use reasonable skill, care and diligence to procure" contemplated insurance arises, and is breached, "if an insurance agent or broker undertakes to procure for another insurance against a designated risk"). Thus, as there is a genuine issue as to whether a legal duty arose for Sheppard to procure insurance without a vacancy exclusion, summary judgment was not appropriate on Holmes's negligence claim.

B. Contributory Negligence

[2] Holmes next argues that Defendants' argument in their motion for summary judgment that Holmes was contributorily negligent did not create sufficient grounds for the trial court to grant summary judgment on his negligence claim. We agree.

Generally, if "a person of mature years of sound mind who can read or write signs or accepts a deed or formal contract affecting his pecuniary interest, it is his duty to read it, and knowledge of the contents will be imputed to him in case he has negligently failed to" so read. *Elam v. Smithdeal Realty & Ins. Co.*, 182 N.C. 599, 603, 109 S.E. 632, 634 (1921). However, this duty "is subject to the qualification that nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard[.]" *Id.* at 603, 109 S.E. at 634. Thus, where an agent or broker says or does something to mislead an individual or to put a person of reasonable business prudence off guard, "the cause should be submitted to the jury on the question whether the failure to hold an adequate policy is due to plaintiff's own negligence in not reading his policy and taking out one sufficient to protect him." *Id.* at 603-04, 109 S.E. at 634.

Whether Holmes read the Policy is not at issue, as Holmes admits he did not read it. Further, he admits that he could have done so. He also testified that he would have done something about the Policy's lack of vacancy exclusion, had he read the policy. Nonetheless, Holmes argues that the cause should be submitted to the jury on the question of whether this failure was contributorily negligent so as to bar his claim under the qualification described in *Elam* because Sheppard made representations regarding the coverage that misled him, or put him off his

guard. Defendants argue that Sheppard made no such representations, and, therefore, Holmes was contributorily negligent, barring relief.

Contrary to Defendants' assertions, there are some facts in evidence, through Holmes's deposition testimony, that suggest Holmes may have been misled, or put off his guard, by Sheppard. Holmes denied he told Sheppard he was going to lease the residence, and repeatedly emphasized that he told Sheppard he did not want another issue to be caused by vacancy. From this testimony, a jury could determine that Sheppard misled Holmes, or put him off his guard, and, thus, Holmes's failure to read the policy does not necessitate as a matter of law that summary judgment be granted on his claim that Defendants were negligent.

Thus, we reverse the trial court's grant of summary judgment for Defendants on Holmes's negligence claim.

II. Negligent Misrepresentation

[3] Holmes argues the trial court erred in granting summary judgment on his negligent misrepresentation claim. We disagree.

"[N]egligent misrepresentation occurs when in the course of a business or other transaction in which an individual has a pecuniary interest, he or she *supplies false information* for the guidance of others in a business transaction, without exercising reasonable care in obtaining or communicating the information." *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 256, 552 S.E.2d 186, 191 (2001) (quotation omitted). However, "when a party relying on a misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Id.* at 256, 552 S.E.2d at 192 (quotation omitted).

Here, Holmes argues that Sheppard supplied false information by informing Holmes that the Policy would meet his needs. While whether this is "false information" is in dispute, Holmes could have discovered the truth that there was not a vacancy exclusion upon simple inquiry by reading the Policy. Holmes repeatedly testified that he never read the Policy insuring the Property, despite receiving it in the mail. Had he read the Policy, he would have learned that it did not include a vacancy exclusion. Thus, because he could have discovered the truth upon inquiry, the complaint had to allege Holmes was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence. It did not, so the trial court appropriately granted summary judgment as to Holmes's claim for negligent misrepresentation.

III. Merger and Acceptance of the Policy

[4] Holmes argues summary judgment could not be granted based on Defendants' argument that summary judgment was appropriate because Holmes received, retained, and, thus, accepted as written the Policy. We agree.

Defendants support their argument with an insurance contract case, *State Distributing Corp. v. Travelers Indemnity Co.*, 224 N.C. 370, 30 S.E. 377 (1944). In *State Distributing Corp.*, the plaintiff requested both robbery and burglary insurance. *Id.* at 375-76, 30 S.E. at 380. The insurance agent sent the plaintiff a letter that constituted a temporary binder pending issuance of the formal policy, which stated that while the application was being processed, the insurer would put coverage into effect immediately. *Id.* at 376, 30 S.E. at 380. When the formal policy arrived, it only covered robbery. *Id.* at 376, 30 S.E. at 380. Our Supreme Court held that in the context of the continued efficacy of an insurance binder after delivery of an actual policy, the formal policy merged all prior or contemporaneous parole agreements, and upon accepting the policy, thereby assented to the terms. *Id.* at 376, 30 S.E. at 380-81. Thus, *State Distributing Corp.* did not concern whether the agent was subject to negligence for failure to procure requested coverage. Instead, here, as in *Elam*, "the action is not one . . . in which plaintiff is seeking to hold [the insurance company] liable for an obligation not contained in the written policy[;]" instead, the plaintiff is suing "the agent and broker for negligent failure to perform a duty he had undertaken and assumed as agent, by which plaintiff has suffered the loss complained of[.]" *Elam*, 182 N.C. at 602, 109 S.E. at 633. Therefore, summary judgment cannot be granted based on Defendants' argument that summary judgment was appropriate because, allegedly, Holmes received, retained, and accepted the Policy as written.

IV. Defendants' Cross-Assignment of Error

[5] Defendants contend their motion to dismiss Holmes's claims for failure to state a claim upon which relief can be granted provides an alternative basis in the law upon which relief can be granted. We disagree, because this cross-assignment of error is not properly before our Court.

North Carolina Rule of Appellate Procedure 10(c) provides, in pertinent part:

> Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any

> action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief.

N.C.R. App. P. 10(c) (2017).

Our Supreme Court has explained that this rule is a mechanism to provide "protection for appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based." *Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982) (discussing the rule for cross-assignments of error).

In the present case, the trial court determined the granting of the motion for summary judgment rendered the motion to dismiss moot. During the hearing, Defendants agreed with the trial court that its ruling on summary judgment rendered the motion to dismiss moot:

> [Trial court]: After careful consideration of the court file and everything handed up by counsel and arguments of counsel, Court is of the opinion that the motions for summary judgment as to each count of the complaint should be allowed. And does that make moot then the motion to dismiss?
>
> [Defendants]: It does, Your Honor.
>
> [Trial Court]: Okay. I'll ask you to draw that, [Defense counsel].

By not objecting, Defendants failed to properly preserve any action or omission of the trial court for appellate review as required by North Carolina Rule of Appellate Procedure 10(c). *See* N.C.R. App. P. 10(a)(1) (2017) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Conclusion

For the reasons stated above, we affirm the trial court granting summary judgment in favor of Defendants on the negligent misrepresentation

and constructive fraud claims. However, the trial court erred in granting summary judgment on Holmes's negligence claim. We reverse for Holmes to proceed with the negligence claim.

REVERSED IN PART; AFFIRMED IN PART.

Judges CALABRIA and ZACHARY concur.

IN THE MATTER OF ANTHONY RAYSHON BETHEA

No. COA17-459

Filed 3 October 2017

1. Sexual Offenders—sex offender registry—substantive due process—current or potential threat to public safety

The trial court did not violate petitioner's due process rights by denying his request to be removed from the North Carolina Sex Offender Registry where although the trial court found he was not otherwise a current or potential threat to public safety, N.C.G.S. § 14-208.12A identified and classified petitioner as a continuing threat to public safety under federal sex offender standards.

2. Constitutional Law—ex post facto law—retroactive application of law—Adam Walsh Act—Sex Offender Registration and Notification Act—minimum sex offender registration period

Petitioner's contention that the retroactive application of the Adam Walsh Act (also known as the Sex Offender Registration and Notification Act) for minimum sex offender registration periods through N.C.G.S. § 14-208.12A(a1)(2) constituted an ex post facto law was overruled where it was already addressed by in *In re Hall* and *State v. Sakobie*.

Appeal by petitioner from order entered 31 October 2016 by Judge Carl R. Fox in Chatham County Superior Court. Heard in the Court of Appeals 20 September 2017.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr. for the State.

TYSON, Judge.

Anthony Rayshon Bethea ("Petitioner") appeals from the trial court's denial of his petition to be removed from the North Carolina Sex Offender Registry. We affirm the trial court's order.

I. Background

On 13 September 2004, Petitioner pled guilty to six counts of felony sexual activity with a student in violation of N.C. Gen. Stat. § 14-27.7(b), upon which the court sentenced Petitioner. This sexual activity with a student offense to which Petitioner pled guilty is now codified under N.C. Gen. Stat. § 14-27.32 (2015).

Following his convictions, Petitioner registered as a sex offender on 14 October 2004 under the North Carolina Sex Offender and Public Protection Registration Program ("the Registry Program"). *See* N.C. Gen. Stat. § 14-208.7, et. seq (2015) (establishing the North Carolina Sex Offender and Public Protection Registration Program).

Under the version of the Registry Program in effect at the time of his 2004 convictions, Petitioner's requirement to be registered as a sex offender was to automatically terminate after ten years had elapsed, if he did not commit any further offenses requiring registration. N.C. Gen. Stat. § 14-208.12A (2004).

Statutory amendments in 2006 to the Registry Program affected Petitioner's registration status. First, section 14-208.7 was amended to provide that registration of convicted sex offenders could continue beyond ten years, even when the registrant had not re-offended. N.C. Gen. Stat. § 14-208.7(5a) (2007) (providing that the registration requirement "shall be maintained for a period of at least ten years following the date of initial county registration").

Second, the provision of section 14-208.7, which provided for automatic termination of registration, was removed. Section 14-208.12A was added to the Registry Program. The current version of section 14-208.12A provides that persons wishing to terminate their registration requirement must petition the superior court for relief.

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.

. . .

(a1) The court may grant the relief if:

(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A (2015), *amended by* N.C. Sess. Laws 2017-158, § 22 (adding a provision to section 14-208.12A(a) irrelevant to this appeal).

In 2006, Congress enacted the Adam Walsh Act, also known as the Sex Offender Registration and Notification Act ("SORNA"). *See* 42 U.S.C. § 16901, *et seq.* The Adam Walsh Act replaced the Jacob Wetterling Act, the prior federal law addressing sex offender registration. This Court has held "[t]he Adam Walsh Act now provides the 'federal standards applicable to the termination of a registration requirement [under N.C. Gen. Stat. § 14-208.12A(a1)(2)]' and covers substantially the same subject matter as the Jacob Wetterling Act." *In re Hamilton*, 220 N.C. App. 350, 356, 725 S.E.2d 393, 398 (2012).

SORNA establishes rules governing sex offender registration and conditions state receipt of certain federal funds on a state's implementation of those rules. *See* 42 U.S.C. §§ 16915, 16925. SORNA utilizes a three-tiered system for classifying sex offenders:

> Under SORNA, a tier I sex offender must register for fifteen years, a tier II sex offender must register for twenty-five years, and a tier III sex offender must register for life. However, a tier I sex offender may reduce his or her registration period to ten years by keeping a clean record; likewise, a tier II sex offender may reduce his or her registration period to twenty years. Only a tier III sex offender who is "adjudicated delinquent [as a juvenile] for the offense" may reduce his or her registration period to twenty-five years; otherwise, a tier III sex offender is subject to lifetime registration. *See* 42 U.S.C.S. § 16915(a), (b) (2013).

In re Hall, 238 N.C. App. 322, 326, 768 S.E.2d 39, 42-43 (2014), *appeal dismissed and disc. review denied*, ___ N.C. ___, 771 S.E.2d 285, *cert. denied sub nom Hall v. North Carolina*, ___ U.S. ___, 193 L.Ed.2d 519 (2015).

In September 2014, Petitioner petitioned the Superior Court of Chatham County to be removed from the sex offender registry. At the hearing on 31 October 2016, Petitioner did not contest his prior offenses qualified him as a tier II offender under SORNA.

The trial court checked off the following findings of fact on the preprinted form entitled Petition and Order for Termination of Sex Offender Registration, AOC-CR-263, Rev. 12/11:

> 1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above.
>
> 2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date of Initial NC Registration above.
>
> 3. Since the Date of Conviction above, the petitioner has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.
>
> 4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.
>
> 5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.
>
> 6. The petitioner is not a current or potential threat to public safety.
>
> 7. The relief requested by the petitioner [does not] comp[ly] with the provisions of the federal Jacob Wetterling Act, 42 U.S.C § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

The court denied Petitioner's petition for relief from registration and removal from the registry. The court concluded Petitioner's requested

relief and termination of his duty to register would not comply with "federal standards applicable to the termination of registration requirement required to be met as a condition for receipt of federal funds by the State, based upon . . . SORNA[,]" and entered an order thereon.

Petitioner timely appealed from the trial court's denial of his petition.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

Petitioner argues: (1) the trial court violated his substantive due process rights by denying his petition for termination of sex offender registration after finding that he "is not a current or potential threat to public safety"; and, (2) the retroactive activation of federal sex offender registration standards violates the *ex post facto* clauses of the federal and state constitutions.

IV. Standard of Review

This Court "reviews conclusions of law pertaining to constitutional matters de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citations omitted). Under *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

V. Analysis

A. Substantive Due Process

Petitioner argues the trial court's denial of his petition for termination of sex offender registration violates his substantive due process rights. He asserts that after the trial court found Petitioner "is not a current or potential threat to public safety[,]" it was arbitrary for the trial court to deny his petition and to require him to continue to register because of the SORNA standards incorporated into state law under section 14-208.12A(a1)(2). We disagree.

Petitioner argues "[t]he State can establish no justification for the arbitrary extension of [his] registration requirement now that he has been judicially determined to be no threat to the public." Petitioner failed to challenge the trial court's findings of fact detailed above. When "the trial court's findings of fact are not challenged on appeal, they

are deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004).

1. XIV Amendment and Article I § 19

[1] Pursuant to the Constitution of the United States, "[n]o State shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const., amend. XIV, § 1. The North Carolina Constitution provides that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Our Supreme Court has held that "[t]he term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (citation and quotations omitted).

The Due Process Clause provides two types of protection: substantive and procedural due process. *See State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998).

" 'Substantive due process' protection prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *Id.*

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

Washington v. Glucksberg, 521 U.S. 702, 720-21, 138 L.Ed.2d 772, 787-88 (1997) (citations and quotations omitted).

Although the trial court did check or select the box on the pre-printed AOC form finding Petitioner "is not a current or potential threat to public safety[,]"section 14-208.12A(a1) allows a trial court to grant a petition for relief to register and removal from the Registry Program only if:

> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is *otherwise satisfied* that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A(a1) (emphasis supplied).

The statute clearly states that upon a finding that a petitioner does not have a dis-qualifying arrest and is not ineligible for relief under federal law, a trial court is required to find a petitioner is not *otherwise* a "current or potential threat to public safety" before it can exercise its discretion to grant relief. Here, the trial court determined Petitioner did not have a disqualifying arrest and that he is ineligible for relief under federal law.

Reading the pre-printed "[t]he petitioner is not a current or potential threat to public safety[,]" finding of fact on the AOC form in light of the language of section 14-208.12A, clarifies this finding of fact. The trial court did not find Petitioner is not a current or potential threat to public safety without qualification, rather Petitioner is not *otherwise* a current or potential threat to public safety beyond his ineligibility for removal from the registry under federal law. The required findings are cumulative and the court's finding in Petitioner's favor on one, some, or even most of the requirements does not reduce Petitioner's burden to show compliance with all requirements.

The incorporation of federal sex offender registration standards into section 14-208.12A(a1)(2) is rationally related to the government purpose of protecting public safety, especially the protection and safety of minors and other victims, from sexual offenders. Even though the trial court found Petitioner "is not otherwise a current or potential threat to public safety," section 14-208.12A identifies and classifies Petitioner as a continuing threat to public safety under federal sex offender standards. *See* N.C. Gen. Stat. § 14-208.12A(a1)(2). The Congress of the United States enacted SORNA: "In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators . . . . " 42 U.S.C. § 16901.

Petitioner's assertion that he has "been judicially determined to be no threat to the public" is a threshold finding that is required in the seven listed required findings, in addition to compliance with section 14-208.12A, which limits what the trial court can conclude before it grants his requested relief. *See* N.C. Gen. Stat. § 14-208.12A.

B. *Ex Post Facto*

[2] Petitioner next contends the retroactive application of SORNA to section 14-208.12A constitutes an *ex post facto* violation. We disagree.

The enactment of *ex post facto* laws is prohibited by both the Constitution of the United States and the North Carolina Constitution. See U.S. Const. art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). This prohibition against *ex post facto* laws applies to:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citations and quotation omitted), *cert. denied*, 537 U.S. 1117, 154 L.E. 2d. 795 (2003). "Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *Id.* (citation omitted).

Petitioner's contention that the retroactive application of SORNA minimum registration periods through section § 14-208.12A(a1)(2) constitutes an *ex post facto* law was recently addressed by this Court in *In re Hall*, 238 N.C. App. at 329-33, 768 S.E.2d at 44-46. In *Hall*, the Court stated:

> This Court has held that Article 27A of Chapter 14 [N.C. Gen. Stat. § 14-208.5 *et seq.*] of our North Carolina General Statutes sets forth civil, rather than punitive, remedies and, therefore, does not constitute a violation of ex post facto laws. *See* [*State v. Williams*, 207 N.C. App. 499, 505, 700 S.E.2d 774, 777-78 (2010)]. Therefore, in light of this Court's prior decisions rejecting the argument that our sex offender registration statutes constitute an ex post facto law, we are bound to say that petitioner's argument lacks merit.

Id. at 332, 768 S.E.2d at 46.

In *State v. Sakobie*, 165 N.C. App. 447, 598 S.E.2d 615 (2004), this Court held "the legislature did not intend that the provisions of Article 27A [to] be punitive [and] . . . the effects of North Carolina's registration law do not negate the General Assembly's expressed civil intent and that retroactive application of Article 27A does not violate the prohibitions against *ex post facto* laws." 165 N.C. App. at 452, 598 S.E.2d at 618 (citations omitted).

We are bound by the precedents in *Hall* and *Sakobie*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Petitioner's argument that the extension of his registration period as a sex offender through the incorporation of SORNA federal standards into N.C. Gen. Stat. § 14-208.12A(a1)(2) is overruled.

VI. Conclusion

Petitioner has failed to show any reversible errors in the trial court's order. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
BEVERLY LEE PHILLIPS, VICTORIA PHILLIPS, AND JOHN DOE 236, DEFENDANTS

No. COA16-620

Filed 3 October 2017

Insurance—duty to defend—liability policy—sexual assault on defendant's daughter—declaratory judgment

There was no duty to defend by an insurance company where the policy holders were sued for negligence arising from a sexual assault upon defendant John Doe's daughter. The policy provided coverage for suits arising from bodily injury or property damage, and John Doe's claims for loss of his daughter's services and their damaged relationship did not arise from bodily injury as defined by the policy.

Appeal by plaintiff from judgment entered 12 April 2016 by Judge G. Bryan Collins, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 16 November 2016.

Young Moore and Henderson P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for plaintiff-appellant.

Batch, Poore & Williams, PC, by J. Patrick Williams, for defendant-appellee Beverly Lee Phillips and Victoria Phillips.

Jeff Anderson & Associates, P.A., by Gregg Meyers, pro hac vice, and Copeley Johnson & Groninger PLLC, by Leto Copeley, for defendant-appellee John Doe 236.

STROUD, Judge.

Plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc. appeals a judgment ordering it to defend and indemnify defendants Beverly Lee Phillips and Victoria Phillips under the insurance policy plaintiff issued to them. We reverse and remand.

I. Background

The background of this case is provided by the trial court's judgment and is not at issue on appeal:

1. Farm Bureau issued policy FO 1051463 to Beverly Lee Phillips and Vicki O. Phillips as named insureds effective January 11, 2008. The policy has been renewed annually and amended from time to time through January 11, 2016.

. . . .

5. Beverly Lee Phillips was charged with various sexual offenses which occurred over a period of time against the minor child of John Doe 236, referred to in this order as KGK.

6. From those various charges, Beverly Lee Phillips agreed to plead guilty to two counts of taking indecent liberties with KGK (a violation of N.C.G.S. 14-202.1) and two counts of sexual activity by a substitute parent (a violation of N.C.G.S. 14-27.7[a]).

7. The date of the offenses pertinent to the plea were within the 2008 policy year: May 1, 2008 and August 7, 2008. The date on which the cause of action for John Doe 236 arose was in the 2012 policy year, when he learned of the abuse of KGK.

8. John Doe 236 is a pseudonym for the father of KGK. John Doe 236 filed a civil action in Chatham County Superior Court against Beverly Lee Phillips and Victoria Phillips: John Doe 236 v. Beverly Lee Phillips and Victoria Phillips, 14 CVS 885, Chatham County Superior Court (the Chatham County Action). That complaint alleges one cause of action for negligence and one cause of action for loss of services.

9. The Chatham County Action alleges in its statement of the "Nature of the Wrongdoing" that "Beverly Phillips was convicted of indecent liberty with [John Doe 236's] minor child;" that "Beverly Lee Phillips was charged and convicted for the sexual battery of the [John Doe 236's] minor child;" and that "[t]his case is about sexual battery made against [John Doe 236's] child by Beverly Lee Phillips, and the negligence of Victoria Phillips to entrust that minor with Beverly Lee Phillips."

10. The First Cause of Action of the Chatham County Action alleges in pertinent part that "Defendant Victoria

Phillips was negligent in failing to properly supervise Beverly Lee Phillips, or warn [John Doe 236] about the assailant;" that "as a result of the conduct of the Defendants, [John Doe 236's] child suffered damage, and that damage also impeded the relationship between [John Doe 236] and his child and caused independent injury to [John Doe 236]."

11. The Second Cause of Action of the Chatham County Action alleges in pertinent part that "[a]s a direct and proximate result of the assault and battery by Beverly Lee Phillips, and the negligence of Victoria Phillips, [John Doe 236's] child was affected" and that "Defendants' actions and inactions which resulted in the damage to [John Doe 236's] child created difficulty between, parent and child, and loss of services of the child to the father."

12. The First Cause of Action and Second Cause of Action conclude that "Defendants' conduct was willful, wanton, and committed with knowledge that it was likely to cause damage to [John Doe 236] and his minor child. Therefore, [John Doe 236] is entitled to an award of punitive damages." As noted above, the parties agree that punitive damages is not at issue under the policy, and in oral argument counsel for Farm Bureau agreed that viewing the pleading as a whole, that Victoria Phillips is entitled to this allegation being read as a recklessness standard.

13. Beverly Lee Phillips admits that the Transcript of Plea is a true and accurate copy of that plea entered in State v. Beverly Lee Phillips, 09 CRS 315, Chatham County Superior Court; that he initialed the plea arrangement in the Transcript of Plea; and that he signed the Transcript of Plea. By way of explanation, Beverly Lee Phillips asserts in his answers to interrogatories that "I entered a plea in this matter because I was facing significant time if convicted and the plea was in my best interest. However, I maintain now as I did at the time of the plea that I did not sexually assault or harm in any way KGK."

14. Victoria Phillips admits the Transcript of Plea, her husband's initials on the plea arrangement and her husband's signature on the Transcript of Plea. By way of explanation, Victoria Phillips asserts in her answers to

> interrogatories that "we do not believe a sexual assault occurred and my husband entered into plea because it was in his best interests at the time."
>
> 15. Due to his ex-wife abducting his child at age one, and she and her family separating her from him, John Doe 236 learned only in 2012 that his child had been sexually assaulted.

In April of 2015, plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Farm Bureau") filed a complaint for declaratory relief "declaring that the Farm Bureau policies do not apply to any claims in the Chatham County Action, and that Farm Bureau does not have a duty to defend or indemnify Beverly Lee Phillips or Victoria Phillips in the Chatham County Action[.]" The defendants answered and requested that the complaint be dismissed. On 12 April 2016, the trial court entered judgment and ordered that plaintiff "Farm Bureau has a duty to defend and an obligation to indemnify each of Beverly Lee Phillips or Victoria O. Phillips in the Chatham County Action." Plaintiff Farm Bureau appeals.

II. Policy Coverage

Plaintiff Farm Bureau's brief argues several reasons why it should not have an obligation to defend in the Chatham County lawsuit, all based upon the policy language. The parties have presented arguments regarding the meanings of several defined terms and phrases under the policy and exclusions. But we will begin with plaintiff Farm Bureau's last argument first, since it addresses the first relevant definition in the policy and is dispositive. Plaintiff Farm Bureau argues that "the Chatham County claims do not seek damages for 'bodily injury' as defined by the policies." (Original in all caps.) We agree.

A. Standard of Review

Generally,

> [t]he standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal. Findings of fact not challenged on appeal are binding on this Court. However, the trial court's conclusions of law are reviewable *de novo*.

Basmas v. Wells Fargo Bank Nat.'l Ass'n, 236 N.C. App. 508, 511, 763 S.E.2d 536, 538–39 (2014) (citations and quotation marks omitted). Because no issues are raised as to the findings of fact in the judgment on appeal, the only question before this Court is the legal issue of whether plaintiff Farm Bureau has a contractual obligation to defend defendants Beverly and Victoria Phillips for the claims in the Chatham County lawsuit.[1]

B. Comparison Test

> In our Supreme Court's most recent decision on the duty to defend, the Court explained that in order to answer the question whether an insurer has a duty to defend, we apply the comparison test, reading the policies and the complaint side-by-side to determine whether the events as alleged are covered or excluded. In performing this test, the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend.

Kubit v. MAG Mut. Ins. Co., 210 N.C. App. 273, 278, 708 S.E.2d 138, 144 (2011) (citations, quotation marks, and ellipses omitted). Our Supreme Court has also noted that the duty to defend exists unless the facts as alleged in the complaint "are not even arguably covered by the policy." *Id.* at 278, 708 S.E.2d at 144 (citation and quotation marks omitted).

> Our Supreme Court has observed that the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. This duty to defend is ordinarily measured by the facts as alleged in the pleadings. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. An insurer is excused from its duty to defend only if the facts are not even arguably covered by the policy.
>
> . . . .
>
> In addressing the duty to defend, the question is not whether some interpretation of the facts as

1. We take no position on the merits, if any, of the underlying Chatham County lawsuit, which is not at issue in this case.

> alleged could possibly bring the injury within the coverage provided by the insurance policy; the question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury. The manner in which the duty to defend is broader than the duty to indemnify is that the statements of fact upon which the duty to defend is based may not, in reality, be true. As we observed in *Waste Management*, when the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable.

Under *Harleysville*, the duty to defend is broader than the duty to indemnify only in the sense that an unsubstantiated allegation requires an insurer to defend against it so long as the allegation is of a covered injury; however, even a meritorious allegation cannot obligate an insurer to defend if the alleged injury is not within, or is excluded from, the coverage provided by the insurance policy.

Harleysville does not specifically address and nothing in its language appears to revisit the following caveat to the comparison test set out in *Waste Management* imposing a duty on the insurance carrier to investigate:

> Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.
>
> Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage. In this event, the insurer's refusal to defend is at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, the insurer will be responsible for the cost of the defense. This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant

> to pay. In addition, many jurisdictions have recognized that the modern acceptance of notice pleading and of the plasticity of pleadings in general imposes upon the insurer a duty to investigate and evaluate facts expressed or implied in the third-party complaint as well as facts learned from the insured and from other sources. Even though the insurer is bound by the policy to defend groundless, false or fraudulent lawsuits filed against the insured, if the facts are not even arguably covered by the policy, then the insurer has no duty to defend.

Id. at 277–79, 708 S.E.2d at 144-45 (emphasis added) (citations, quotation marks, and brackets omitted). We now turn to the comparison of the complaint to the insurance policy. *See id.* Because the duty to defend may be broader than the duty to indemnify we address the duty to defend because if it fails, so too does the duty to indemnify. *See id.* at 277–79, 708 S.E.2d at 144-45.

C. Analysis

The insurance policy contains coverage both for property and liability coverage, but no property claims are at issue here. The liability coverage includes personal liability coverage labeled as "Coverage L" and medical payments to others labeled as "Coverage M[.]" Defendant John Doe's complaint does not seek to recover for any medical expenses incurred by KGK or himself, so the issue here arises under Coverage L, regarding personal liability:

> Coverage L – Personal Liability – We pay up to our limit, all sums for which an insured is liable by law because of **bodily injury**[2] or property damage caused by an occurrence to which this coverage applies. **We will defend a suit seeking damages if the suit resulted from bodily injury or property damage not excluded under this coverage**. We may make investigations and settle claims or suits that we decide are appropriate. We do not have to provide a defense after we have paid an amount equal to our limit as a result of a judgment or written settlement.

2. All emphasis in bold to the policy language has been added by this Court throughout this opinion.

Bodily injury is defined by the policy as

> bodily harm to a person and includes sickness, disease or death. This also **includes required care and loss of services**.
>
> **Bodily injury does not mean bodily harm**, sickness, disease or death that **arises out of**:
>
> a. a communicable disease; or
>
> b. the actual, alleged or **threatened sexual molestation of a person**.

Defendant John Doe set forth two claims in his complaint. In both claims, the negligence and loss of services, defendant John Doe is not suing for injuries to KGK but for alleged injuries he sustained as a result of the crimes committed against KGK. The negligence claim alleges defendant Victoria Phillips was negligent in caring for KGK because she knew or should have known of defendant Beverly Phillips's "sexual interest" in KGK and her lack of supervision allowed him to sexually abuse her. Defendant John Doe's negligence claim implicates no property damage but rather addresses the damage to "the relationship" with his daughter, and taking the allegations in his complaint as true, *id.* at 278, 708 S.E.2d at 144, it could potentially fall within the definition of a "bodily injury" claim under Coverage L within the policy.

The second claim is entitled "Loss of Services[;]" here, defendant John Doe alleges damages from "loss of services of the child to the father[.]" Defendant John Doe explains in his brief that "loss of services is an ancient Common Law cause of action . . . [u]nder [which] the overt fiction of . . . the injured child's lost 'service' is presumed." *See generally Tillotson v. Currin*, 176 N.C. 479, 480-81, 97 S.E. 395, 396 (1918) ("This is an action brought by the father to recover damages for the seduction of his daughter. . . . The right of the father to recover for debauching his daughter is based upon the loss of services growing out of the relation of master and servant, which, as said by Nash, J., in *Briggs v. Evans*, 27 N.C. 20, is a figment of the law, to open to him the door for the redress of his injury, but is, however, the substratum on which the action is built. If the daughter is under twenty-one years of age, the loss of service is presumed, and no evidence of the fact need be offered; and, if over twenty-one, the slightest service, such as handling a cup of tea, milking a cow, is sufficient at common law to support the action; but, while the father comes into court as a master, he goes before the jury as a father, and may recover damages for his humiliation, loss of the society of his daughter and mental suffering and anguish, destruction

of his household, sense of dishonor, as well as expenses incurred and for loss of services, and the jury may also award exemplary damages as a punishment." (citations and quotation marks omitted)). The claim of seduction can be maintained only by a father, since at common law, the father was master, and the daughter was the servant; it required that the father show that the defendant had sexual intercourse with his daughter, either with or without the daughter's consent. *See generally id.* We will generously assume that the claim for "loss of services" stemming from the claim of "seduction" – which is based upon a master-servant relationship of father to daughter – still exists, *see id.*, and "loss of services" is thus also potentially a "bodily injury" under the policy definitions.

But we must continue with the remainder of the definition of "bodily injury." Defendant John Doe's claims also "arise[] out of" "the actual . . . sexual molestation of a person." No prior North Carolina case has directly addressed the meaning of the words "arising out of" in this context, perhaps because the meaning is apparent, though courts in other states have addressed similar provisions. *See*, *e.g.*, *Supreme Servs. & Specialty Co. v. Sonny Greer*, *Inc.*, 958 So. 2d 634, 645 (La. 2007) ("The key words in this provision are 'arising out of,' which could mean 'but for' the damaged property the resulting incident would not have occurred."). Defendant John Doe's claims are entirely based upon the sexual molestation of his daughter and would not exist "but for" the "molestation of a person[,]" his daughter. *Id.* Whatever name, title, or label defendant John Doe seeks to assign to his claims, they arise out of the sexual molestation of his daughter and are not included under the definition of a "bodily injury" as defined under the policy.

The policy provides that plaintiff Farm Bureau "will defend a suit seeking damages if the suit resulted from bodily injury or property damage not excluded under this coverage." The Chatham County suit did not result from a "bodily injury" as defined by the policy, so we need not consider potential exclusions. The claims raised by defendant John Doe did not result from "bodily injury" as defined by the policy because that definition explicitly does not include bodily harm that "arises out of" "sexual molestation[.]" Because defendant John Doe's entire action hinges on the sexual molestation of his daughter, it is not "a suit seeking damages" resulting "from bodily injury[.]" Therefore, plaintiff Farm Bureau has no duty to defend or indemnify defendants.

III. Conclusion

We reverse the judgment of the trial court concluding there was coverage under the policy and remand for entry of a declaratory judgment

that plaintiff Farm Bureau has no duty to defend or indemnify defendants Beverly and Victoria Phillips in John Doe's Chatham County lawsuit.

REVERSED and REMANDED.

Judges BRYANT and HUNTER concur.

STATE OF NORTH CAROLINA
v.
ROBERT LEWIS BISHOP

No. COA17-55

Filed 3 October 2017

Appeal and Error—writ of certiorari denied—unpreserved argument—failure to make constitutional argument at trial—untimely appeal

The Court of Appeals in its discretion declined to issue a writ of certiorari to review defendant's unpreserved argument regarding enrollment in satellite-based monitoring where defendant conceded that he did not make a constitutional argument to the trial court and also did not timely appeal the trial court's satellite-based monitoring orders. Further, defendant did not show that his argument had merit or that error was probably committed below.

Appeal by defendant from orders entered 29 June 2016 by Judge Robert F. Floyd in Richmond County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

Mark Montgomery for defendant.

DIETZ, Judge.

Defendant Robert Lewis Bishop appeals from the trial court's orders requiring him to enroll in satellite-based monitoring. Bishop did not timely appeal these orders. As explained below, because the arguments Bishop seeks to raise in this appeal are either procedurally barred or

meritless, in our discretion we decline to issue a writ of certiorari and dismiss this untimely appeal for lack of appellate jurisdiction.

Facts and Procedural History

A jury convicted Defendant Robert Lewis Bishop of three counts of taking indecent liberties with a child. The offenses occurred in 2015 and the victim was Bishop's five-year-old daughter. The trial court sentenced Bishop to three consecutive terms of 16 to 29 months in prison and ordered him to enroll in satellite-based monitoring for thirty years. Bishop did not challenge the trial court's imposition of satellite-based monitoring on constitutional grounds at the hearing.

Immediately after the trial court imposed its sentence and satellite-based monitoring order, the court stated, "We have another matter to take care of, I believe?" Bishop then entered an *Alford* plea to two additional counts of indecent liberties with a child. These two additional offenses occurred more than a decade before Bishop's criminal acts against his daughter. The basis of these new offenses was information, apparently obtained while investigating Bishop's crimes against his daughter, that Bishop also had sexually molested his younger brothers. One of Bishop's brothers told the trial court that Bishop "spent his entire life molesting children and getting away with it."

The trial court sentenced Bishop to suspended sentences of 19 to 23 months in prison for these offenses, found that Bishop qualified as a recidivist, and therefore ordered Bishop to enroll in satellite-based monitoring for life. As before, Bishop did not challenge the imposition of this new satellite-based monitoring order on constitutional grounds. Bishop also did not timely appeal either of the trial court's orders imposing satellite-based monitoring. Bishop later filed a petition for writ of certiorari, asking this Court to review the trial court's satellite-based monitoring orders.

Analysis

I. Imposition of Satellite-Based Monitoring

Bishop argues that the trial court erred by ordering him to enroll in satellite-based monitoring without conducting a *Grady* hearing to determine whether that monitoring was reasonable under the Fourth Amendment. Bishop concedes that his argument suffers from two separate error preservation issues. First, Bishop did not make this constitutional argument to the trial court, as the law requires. Second, Bishop did not timely appeal the trial court's satellite-based monitoring orders. Bishop therefore asks this Court to take *two* extraordinary steps to

reach the merits, first by issuing a writ of certiorari to hear this appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument. In our discretion, we decline to do so.

This Court has discretion to allow a petition for a writ of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a). A writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals. Instead, as our Supreme Court has explained, "[a] petition for the writ must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959).

Here, Bishop has not shown that his argument (on direct appeal, at least) is meritorious or that the trial court probably committed error. Indeed, Bishop concedes that the argument he seeks to raise is procedurally barred because he failed to raise it in the trial court. We recognize that this Court previously has invoked Rule 2 to permit a defendant to raise an unpreserved argument concerning the reasonableness of satellite-based monitoring. *State v. Modlin*, __ N.C. App. __, 796 S.E.2d 405, 2017 WL 676957, at *2–3 (2017) (unpublished). But the Court did so in *Modlin* because, at the time of the hearing in that case, "[n]either party had the benefit of this Court's analysis in *Blue* and *Morris*." *Id.* at *2. In *Blue* and *Morris*, this Court outlined the procedure defendants must follow to preserve a Fourth Amendment challenge to satellite-based monitoring in the trial court. *State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 525–26 (2016); *State v. Morris*, __ N.C. App. __, __, 783 S.E.2d 528, 528–29 (2016).

This case is different from *Modlin* because Bishop's satellite-based monitoring hearing occurred several months *after* this Court issued the opinions in *Blue* and *Morris*. Thus, the law governing preservation of this issue was settled at the time Bishop appeared before the trial court. As a result, the underlying reason for invoking Rule 2 in *Modlin* is inapplicable here and we must ask whether Bishop has shown any other basis for invoking Rule 2.

He has not. Bishop's argument for invoking Rule 2 relies entirely on citation to previous cases such as *Modlin*, where the Court invoked Rule 2 because of circumstances unique to those cases. In the absence of any argument specific to the facts of *this* case, Bishop is no different

from countless other defendants whose constitutional arguments were barred on direct appeal because they were not preserved for appellate review. *See, e.g.*, *State v. Garcia*, 358 N.C. 382, 410–11, 597 S.E.2d 724, 745 (2004); *State v. Roache*, 358 N.C. 243, 274, 595 S.E.2d 381, 402 (2004); *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003).

As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because "inconsistent application" of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not. *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007). Because Bishop is no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step. As Bishop concedes, he cannot prevail on this issue without the use of Rule 2 because his constitutional argument is waived on appeal. In our discretion, we decline to issue a writ of certiorari to review this unpreserved argument on direct appeal.

II. Determination of Recidivism

Bishop next argues that the trial court erred in finding that he was a recidivist, thereby qualifying him for lifetime satellite-based monitoring. As with his first argument, Bishop failed to timely appeal on this ground and this Court can address the merits only if it issues a writ of certiorari.

In our discretion, we again decline to issue the writ because Bishop has not shown that his argument has "merit or that error was probably committed below." *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. Under N.C. Gen. Stat. § 14-208.6, a "recidivist" is defined as "a person who has a *prior conviction* for an offense" that is a "reportable conviction" under section 14-208.6(4). N.C. Gen. Stat. § 14-208.6(2b) (emphasis added). A "reportable conviction" under section 14-208.6(4) includes Bishop's conviction for taking indecent liberties with his five-year-old daughter. *Id.* § 14-208.6(4)(a). The statute does not define "prior conviction." Bishop argues that his convictions for three counts of indecent liberties against his daughter cannot count as a "prior conviction" because they occurred on the same day as his guilty plea to the two additional counts of indecent liberties against his brothers.

Bishop relies on this Court's decision in *State v. Springle*, where we found that the defendant's two convictions for indecent exposure "cannot function as 'prior convictions' for purposes of categorizing defendant

as a recidivist because defendant was *simultaneously* convicted of both counts of indecent exposure." __ N.C. App. __, __, 781 S.E.2d 518, 523 n.3 (2016). *Springle* is readily distinguishable from this case because Bishop was not *simultaneously* convicted of the two separate sets of offenses that rendered him a recidivist. After being convicted and sentenced for offenses committed against his five-year-old daughter in 2015, Bishop chose to plead guilty to separate offenses he committed against his younger brothers more than a decade earlier. At the time Bishop pleaded guilty to these separate offenses, he already had been convicted and sentenced for the 2015 offenses. Thus, he had a prior conviction for a reportable offense at the time the trial court sentenced him on the new convictions. That his prior conviction occurred earlier the same day rather than the day before, or many years before, is irrelevant; Bishop was convicted and sentenced at different times for two separate sets of qualifying offenses. Accordingly, Bishop satisfied the statutory definition for a recidivist and the trial court properly applied the statute's plain language in this case.

Because we find that Bishop's argument is meritless, in our discretion we decline to issue a writ of certiorari and therefore dismiss Bishop's untimely appeal for lack of appellate jurisdiction.

Conclusion

In our discretion, we deny Bishop's petition for a writ of certiorari and dismiss this appeal for lack of jurisdiction.

DISMISSED.

Judges ELMORE and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTOINE CHESTNUT, DEFENDANT, AND MELISSA HINES, BAIL AGENT, AND AGENT ASSOCIATES INSURANCE, L.L.C., SURETY

No. COA16-1310

Filed 3 October 2017

Penalties, Fines, and Forfeitures—bond forfeiture—motion to set aside—failure to identify statutory basis

The trial court lacked authority to allow a surety's motion to set aside a bond forfeiture where the surety did not identify the specific statutory basis under N.C.G.S. § 15A-544.5 of its motion on the written form it filed.

Appeal by Wilson County Board of Education from order entered 3 October 2016 by Judge John J. Covolo in District Court, Wilson County. Heard in the Court of Appeals 7 August 2017.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, Plaintiff-Appellant.

No brief for Michael Antoine Chestnut, Defendant-Appellee.

No brief for Melissa Hines, Bail Agent.

No brief for Agent Associates Insurance, L.L.C., Defendant-Appellee Surety.

McGEE, Chief Judge.

The Wilson County Board of Education ("the Board of Education")[1] appeals from the trial court's order granting a motion to set aside a bond forfeiture filed by Agent Associates Insurance, L.L.C. ("Surety"). For the reasons discussed below, we vacate the trial court's order.

1. "The Board's status as appellant in the instant case is due to its status as the ultimate recipient of the 'clear proceeds' of the forfeited appearance bond at issue herein, pursuant to Article IX, § 7 of the North Carolina Constitution." *State v. Dunn*, 200 N.C. App. 606, 607 n.1, 685 S.E.2d 526, 527 n.1 (2009) (citation omitted).

I. Background

Michael Antoine Chestnut ("Defendant") failed to appear in Wilson County District Court on an underlying criminal charge on 8 April 2016. On that same day, the trial court issued a bond forfeiture notice for the forfeiture of an appearance bond in the amount of $1,500.00 posted by Melissa Hines ("Bail Agent") on Surety's behalf. The notice set a final judgment date of 8 September 2016, and notice of the bond forfeiture was given to Bail Agent and Surety on 11 April 2016.[2]

Bail Agent filed a motion to set aside the forfeiture ("the motion to set aside") on 6 September 2016. A pre-printed form, Form AOC-CR-213, is used for motions to set aside a bond forfeiture. This form lists seven exclusive reasons, pursuant to N.C. Gen. Stat. § 15A-544.5, for which a bond forfeiture may be set aside, along with corresponding boxes for a movant to mark the specific reason(s) alleged for setting aside the forfeiture. Bail Agent did not check any of these boxes in this case. In addition to the motion to set aside, however, Bail Agent submitted a letter stating that Bail Agent "ha[d] been putting forth efforts to locate [Defendant] and ha[d] been unsuccessful in doing so[,]" despite "spen[ding] $150.00 checking leads as to where and how [Bail Agent could] locate [Defendant]." The Board of Education filed a Form AOC-CR-213 objecting to the motion to set aside on 12 September 2016.

The trial court held a hearing on Surety's motion to set aside on 3 October 2016. At the conclusion of the hearing, the trial court allowed the motion, based on its finding that Surety "ha[d] established one or more of the reasons specified in [N.C.G.S.] 15A-544.5 for setting aside [the] forfeiture." The Board of Education appeals.

II. Discussion

A. *Standard of Review*

In an appeal from an order setting aside a bond forfeiture, "the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted); *see also* N.C.

2. Notice of a bond forfeiture is effective when the notice is mailed. N.C. Gen. Stat. § 15A-544.4(d) (2015). "A forfeiture becomes a final judgment of forfeiture on the 150th day after notice of forfeiture is given, unless a motion to set aside the forfeiture is either entered on or before or is pending on that date." *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48-49, 612 S.E.2d 148, 151 (2005) (citing N.C. Gen. Stat. § 15A-544.6).

Gen. Stat. § 15A-544.5(h) (2015) (providing in part that "[a]n order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions."). Questions of law, including matters of statutory construction, are reviewed *de novo*. *See In re Hall*, 238 N.C. App. 322, 324, 768 S.E.2d 39, 41 (2014) (citation omitted) ("Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*[.]").

B. *Analysis*

1. Statutory Framework

In North Carolina, bail bond forfeiture is governed by N.C. Gen. Stat. §§ 15A-544.1 – 544.8.

> If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond.

N.C. Gen. Stat. § 15A-544.3 (2015). A forfeiture entered under N.C.G.S. § 15A-544.3 becomes a final judgment of forfeiture "on the one hundred fiftieth day after notice is given under [N.C.G.S.] 15A-544.4 if (1) [n]o order setting aside the forfeiture under G.S. 15A-544.4 is entered on or before that date; and (2) [n]o motion to set aside the forfeiture is pending on that date." N.C. Gen. Stat. § 15A-544.6 (2015).

"The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C. Gen. Stat. § 15A-544.5." *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (citation and quotation marks omitted). Pursuant to N.C. Gen. Stat. § 15A-544.5(a), "there shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section." In turn, N.C. Gen. Stat. 15A-544.5(b) states that

> [e]xcept as provided by subsection (f) of this section, a forfeiture shall be set aside for any one of the following reasons, *and none other*:
>
> (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that

failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court otherthan by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.

(5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.

(6) The defendant was incarcerated in a unit of the Division of Adult Correction of the Department of Public Safety and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Division of Adult Correction of the Department of Public Safety or Federal Bureau of Prisons, including an electronic record.[3]

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3. After the present appeal was filed, the General Assembly amended N.C. Gen. Stat. § 15A-544.5(b)(6) to read as follows:

> The defendant was incarcerated in a unit of the Division of Adult Correction *and Juvenile Justice* of the Department of Public Safety and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Division of Adult Correction *and Juvenile Justic*e of the Department of Public Safety or Federal Bureau of Prisons, including an electronic record.

See North Carolina Sess. Law 2017-186 (eff. 25 July 2017) (emphases added).

> (7) The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C. Gen. Stat. § 15A-544.5(b)(1)-(7) (2015) (emphasis added); *see also State v. Rodrigo*, 190 N.C. App. 661, 664, 660 S.E.2d 615, 617 (2008) ("Relief from a forfeiture, before the forfeiture becomes a final judgment, is exclusive and limited to the reasons provided in N.C. Gen. Stat. § 15A-544.5."). A party seeking to set aside a forfeiture must make a timely written motion "stat[ing] the reason for the motion and attach[ing] to the motion the evidence specified in subsection (b) of this section." N.C. Gen. Stat. § 15A-544.5(d) (2015). This Court has held that a trial court lacks the authority to allow a motion to set aside that is "not premised on any ground set forth in [N.C.]G.S. § 15A-544.5." *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005).

2. Surety's Motion to Set Aside

In the present case, the Board of Education argues the trial court erred in allowing Surety's motion to set aside because Surety failed to demonstrate a legally sufficient reason to set aside a bond forfeiture pursuant to N.C.G.S. § 15A-544.5. We agree.

The record filed in this matter does not show that Surety established any of the reasons enumerated in N.C.G.S. § 15A-544.5(b) in support of its motion to set aside the forfeiture. Surety did not identify the specific statutory basis of its motion on the written form it filed, in that no box was checked on the AOC-CR-213 form. A letter attached to the written motion stated that Bail Agent "ha[d] been putting forth efforts to locate [Defendant] and ha[d] been unsuccessful in doing so." However, such documentation does not fall within any of the seven exclusive reasons for setting aside a forfeiture pursuant to N.C.G.S. § 15A-544.5(b).

See, *e.g.*, *State v. Lazaro*, 190 N.C. App. 670, 673, 660 S.E.2d 618, 620 (2008) (holding trial court erroneously granted motion to set aside based on evidence that defendant was deported, because "deportation is not listed as one of the . . . exclusive grounds that allowed the court to set aside a bond forfeiture."). Accordingly, we conclude the trial court's finding that Surety "established one or more of the reasons specified in G.S. 15A-544.5" was not supported by competent evidence.

Our holding in the present case follows *State v. Cobb*, ___ N.C. App. ___, ___ S.E.2d ___, 2017 WL 2945860 (2017), a recently published opinion of this Court, that involved similar facts. In *Cobb*, a bail agent filed a motion to set aside a bond forfeiture using Form AOC-CR-213, and checked a pre-set box stating that the defendant "ha[d] been surrendered by a surety on the bail bond as provided by [N.C.]G.S. 15A-540, as evidenced by the attached 'Surrender of Defendant By Surety' ([Form] AOC-CR-214)[,]" *i.e.*, ground (b)(3) under N.C.G.S. § 15A-544.5. *Id.*, 2017 WL 2945860 at *2 (quotation marks omitted). However, instead of attaching Form AOC-CR-214, the bail agent attached a printout from the Automated Criminal/Infractions System ("ACIS"). The ACIS printout indicated the defendant had been charged with an unrelated traffic offense, to which he pled guilty, "and that, as part of the disposition [of the traffic offense charge], [the] defendant agreed to plead guilty in [another unrelated case]." *Id.*

This Court observed that "[t]he ACIS printout included no reference to [the] case number . . . [for] the case in which the bond was forfeited." *Id.* The majority found that the ACIS printout, the only documentary evidence in the record offered to show that the defendant had been surrendered by a surety on the bail bond, "did not meet the requirement of a sheriff's receipt contemplated by [N.C.G.S. § 15A-544.5(b)(3)]; i.e., [the specific] evidence [required to prove that the] defendant was surrendered by a surety on the bail bond." *Id.* at *3. According to the majority, "where the facts of record do not support the asserted ground for the motion [to set aside] or any other ground set forth in [N.C.G.S. § 15A-544.5] subsection (b), [there is] no basis on [such] record for the trial court to exercise statutory authority to set aside the bond forfeiture." *Id.*

The dissenting opinion deemed it "impossible . . . to reach a conclusion on the validity of the trial court's order without a record of what transpired at the hearing." *Id.* at *8 (Zachary, J., dissenting). According to the dissent, "the only pertinent question [for this Court] . . . [was] the [sufficiency of the] evidence provided by the surety *at the hearing before the trial court*." *Id.* at *8 (emphasis in original). In the dissent's view,

> [t]he propriety of the trial court's order cannot be determined merely by review of the documentation that the surety attached to its motion [to set aside], because the trial court's order was entered following a hearing at which the parties would have been allowed to present additional testimony or evidence.

Id. at *7. The dissent noted that if a transcript is unavailable, an appellant may create a record of the trial court hearing by preparation of a narration of the proceedings pursuant to N.C. R. App. P. 9(c)(1). *Id.* This Court, the *Cobb* dissent concluded, was required to presume the trial court acted properly because "the appellate record [did] not contain any indication of the evidence or testimony offered at the hearing in addition to, or instead of, the ACIS statement attached to the surety's motion." *Id.*

The majority acknowledged that, as the appellant, "the Board of Education had a duty to provide a complete record and that failure to do so should be met with strong disapproval." *Id.* at *3.

> However, appellant Board compiled a proposed record on appeal, and when the time for response to appellant Board's proposed record expired without comment from the surety, the record was settled by operation of the Rules of Appellate Procedure. Thereafter, only appellant Board filed a brief in this matter. The record as submitted by appellant Board shows error on its face. Unlike the dissent, we will not speculate on what if anything else *may* have occurred before the trial court. This record as reviewed on appeal and argued by appellant, contains documentary evidence which, on its face, does not support the ruling of the trial court.

Id. (internal citation omitted) (emphasis in original).

The Cobb majority controls in the present case. As in *Cobb*, the record on appeal in the present case was compiled and proposed by the Board of Education. Surety took no action within the time allowed for responding, and the record was therefore settled by operation of N.C. R. App. P. 11(b).[4] The only documentary evidence in the record before

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4. "If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall . . . serve upon all other parties a proposed record on appeal . . . . Within thirty days . . . after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with

us – the letter attached to Surety's motion to set aside – does not support any of the grounds for setting aside a forfeiture enumerated in N.C.G.S. § 15A-544.5(b). Accordingly, under *Cobb*, the record in the present case "supports a conclusion, not a presumption, that the trial court erred, as there is not [a] sufficient basis in the record to warrant the exercise of statutory authority to set aside a bond forfeiture." *Id.*

We note that the four companion cases filed contemporaneously with this appeal are factually distinguishable from both *Cobb* and the present case in that, in those cases, the records on appeal contained no documentary evidence to support the sureties' motions to set aside.[5] In each of the companion cases, a bail agent or surety filed a motion to set aside a bond forfeiture, using Form AOC-CR-213, without checking any of the preprinted boxes to identify the alleged statutory basis for the motion. The records on appeal did not indicate whether any evidence was attached to the motions to set aside, and transcripts of the hearings were not provided to this Court.[6] *See supra* n.5. However, in light of *Cobb*, which was decided after the Board of Education filed the records on appeal and appellate briefs in the present case and the companion cases, the Board of Education filed motions to amend each record on appeal to add narrations of the trial court hearings. *See* N.C.R. App. P. 9(b)(5), 9(c)(1). No objections were filed to the Board of Education's motions to amend the records on appeal in the present case or the companion cases, and this Court allowed the motions on 7 August 2017. The narrations submitted by the Board of Education assert that, during each hearing, (1) the bail agent or surety "did not argue that any of the statutory bases for set aside had been met," and (2) "[n]either the Board [of Education] nor [the bail agent or surety] submitted any sworn

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Rule 11(c). If all appellees within the times allowed them . . . fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal." N.C.R. App. P. 11(b).

5. The companion cases are *State v. Reaves* (COA16-1311); *State v. Bowens* (COA16-1312); *State v. Owens* (COA16-1313); and *State v. Mercer* (COA16-1314). These cases, in addition to the present case, were heard the same day, in the same trial court, and the Board of Education was the objecting party in each case. According to the Board of Education, in both the present case and the four companion cases, written transcripts of the hearings are unavailable because no audio recordings were made and no court reporter was present during the hearings.

6. As in the present case, the records on appeal in all four companion cases were settled by operation of the Rules of Appellate Procedure after no action was taken by the respective bail agent or surety, and, thereafter, the Board of Education was the only party to file a brief.

testimony, affidavits, or additional documents to the [trial] court during the hearing." The amended records on appeal thus allay the concerns expressed in the *Cobb* dissent and permit a conclusion that, in all five cases, there was insufficient evidence before the trial court to support any of the statutory grounds for setting aside a bond forfeiture pursuant to N.C.G.S. § 15A-544.5(b). As a result, the trial court erred by setting aside the forfeitures.

III. Conclusion

The trial court lacked authority to allow Surety's motion to set aside the bond forfeiture absent evidence required under N.C.G.S. § 15A-544.5. The order allowing the motion to set aside the bond forfeiture is vacated.

VACATED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
LINWOOD EARL GREENE, DEFENDANT

No. COA17-311

Filed 3 October 2017

Satellite-Based Monitoring—motion to dismiss application—sufficiency of evidence—enrollment—reasonable Fourth Amendment search

The trial court erred by denying defendant's motion to dismiss the State's application for satellite-based monitoring where the State's evidence was insufficient to establish that the enrollment constituted a reasonable Fourth Amendment search under *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*.

Appeal by defendant from order entered 14 November 2016 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

ZACHARY, Judge.

Defendant appeals the Satellite-Based Monitoring Order entered after his *Alford* plea to two counts of taking indecent liberties with a child. Defendant argues on appeal that the trial court erred in ordering lifetime satellite-based monitoring in the absence of evidence from the State that this was a reasonable search of defendant. We agree, and conclude that this matter must be reversed.

Background

Defendant Linwood Earl Greene (defendant) was indicted on 27 October 2014 and on 14 July 2015 for sex offense with a 13, 14, or 15-year old child. On 15 August 2016, defendant entered an *Alford* plea before the Honorable Walter H. Godwin, Jr. to two counts of taking indecent liberties with a child. Judge Godwin then entered an order sentencing defendant to an active term of twenty-six to forty-one months' imprisonment and requiring that defendant register as a sex offender for the remainder of his natural life. No order regarding satellite-based monitoring was entered on that day.

On 14 November 2016, a satellite-based monitoring determination hearing was held upon the State's application before the Honorable Jeffery B. Foster. Defendant filed a Motion to Dismiss the State's Application for Satellite-Based Monitoring prior to the hearing. At the satellite-based monitoring hearing, the State put forth evidence establishing that defendant had a prior conviction of misdemeanor sexual battery, in addition to his conviction on 15 August 2016 of two counts of taking indecent liberties with a child. The State offered no further evidence beyond defendant's criminal record.

The trial court heard arguments from both parties. Referencing his motion to dismiss, defendant challenged the constitutionality of the lifetime satellite-based monitoring enrollment by citing *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*, positing that the State had not met its burden of establishing, under a totality of the circumstances, the reasonableness of the satellite-based monitoring program in light of both the State's interests and defendant's privacy interests. The trial court denied defendant's motion to dismiss, reasoning "that based on the fact that this is the second conviction that . . . defendant has accumulated of a sexual nature, . . . his privacy interests are outweighed by the State's interest in protecting future victims." Judge Foster then ordered that defendant be enrolled in the satellite-based monitoring program for the remainder of his natural life.

On appeal, defendant argues that the trial court erred in ordering lifetime satellite-based monitoring because the State's evidence was insufficient to establish that the enrollment constituted a reasonable Fourth Amendment search under *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*. The State has conceded this point. However, the State contends that it should have a chance to supplement its evidence, upon remand from this Court, in order to support the finding that enrolling defendant in lifetime satellite-based monitoring is a reasonable Fourth Amendment search. Defendant argues that this Court should reverse without remand. Accordingly, the only issue before us involves the appropriate remedy.

Discussion

The United States Supreme Court has held that North Carolina's satellite-based monitoring program constitutes a search for purposes of the Fourth Amendment. *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462, (2015). As such, North Carolina courts must first "examine whether the State's monitoring program is reasonable—when properly viewed as a search"—before subjecting a defendant to its enrollment. *Id.* at ___, 191 L. Ed. 2d at 463. This reasonableness inquiry requires the court to analyze the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L.Ed 2d at 462. These satellite-based monitoring proceedings, while seemingly criminal in nature, are instead characterized as "civil regulatory" proceedings. *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010).

Notwithstanding the fact that satellite-based monitoring proceedings are civil proceedings, the State argues that the civil bench proceeding standard, pursuant to which "[a] dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief[,]"—is inapplicable here. *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999). In so arguing, the State reasons that in satellite-based monitoring proceedings, the State is not specifically referred to as "the plaintiff." This reasoning is far too technical and detracts from the true substance of satellite-based monitoring proceedings. Viewed in the civil context, the State is undoubtedly the party seeking relief in a satellite-based monitoring proceeding. *See* N.C. Gen. Stat. § 14-208.40A(a).

Next, the State argues that remand is proper under *State v. Blue* and *State v. Morris*.

After *Grady* was decided, there was some uncertainty concerning the scope of the State's burden at satellite-based monitoring proceedings, and several cases came up to this Court in the midst of that uncertainty. *See State v. Blue*, ___ N.C. App. ___, 783 S.E.2d 524 (2016); *State v. Morris*, ___ N.C. App. ___, 783 S.E.2d 528 (2016). *Blue* and *Morris* resolved those uncertainties, however, as this Court made it abundantly clear that "the State shall bear the burden of proving that the [satellite-based monitoring] program is reasonable." *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 530. But, having just resolved the uncertainty, it was necessary for this Court to remand *Blue* and *Morris* so that the State would have an appropriate opportunity to establish its burden. *See Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *State v. Morris*, ___ N.C. App. at ___, 783 S.E.2d at 529 (remand appropriate where "the trial court simply considered the case of *Grady v. North Carolina*, and summarily concluded that registration and lifetime satellite-based monitoring constitutes a reasonable search or seizure of the person and is required by statute[]") (internal citations and quotation marks omitted). However, this case is entirely distinguishable, as the nature of the State's burden was no longer uncertain at the time of defendant's satellite-based monitoring hearing. *Blue* and *Morris* made clear that a case for satellite-based monitoring is the State's to make. The State concedes it has not done so.

Even accepting its burden, the State contends that, "[a]s with any appellate reversal of a trial court's determination that plaintiff's evidence is legally sufficient, nothing . . . *precludes* the Appellate Division from determining in a proper case that plaintiff[-]appellee is nevertheless entitled to a new trial." *Harrell v. W.B. Lloyd Constr. Co.*, 300 N.C. 353, 358, 266 S.E.2d 626, 630 (1980) (citations omitted) (emphasis in the original). In *Harrell*, however, remand was appropriate because "incompetent evidence ha[d] been erroneously considered by the trial judge in his ruling on the sufficiency of plaintiff's evidence." *Id.* at 358, 266 S.E.2d at 630 (citations omitted). The evidence was insufficient *in light of* the improperly considered evidence. *Id.* Therefore, it was necessary to remand the case in order for the trial court to consider the matter anew absent the erroneously admitted evidence. In contrast, there has been no contention in this case that the State's evidence was improperly considered by the trial court. The conceded error instead involves the State's evidence having been too scant to satisfy its burden under the requirements of *Grady*.

Because "dismissal under Rule 41(b) is to be granted if the plaintiff has shown no right to relief[,]" having conceded the trial court's

error, the State must likewise concede that the proper outcome below would have been for the trial court to grant defendant's motion and dismiss the satellite-based monitoring proceeding against him.[1] *See Jones v. Nationwide Mut. Ins. Co.*, 42 N.C. App. 43, 46-47, 255 S.E.2d 617, 619 (1979). And if, as the State's concession requires, the trial court had properly dismissed the satellite-based monitoring application, the matter would have ended there. The State cites no authority suggesting that it would have been permitted to "try again" by applying for yet another satellite-based monitoring hearing against defendant, in the hopes of this time having gathered enough evidence. Instead, the result of the trial court's dismissal would have been just that—a dismissal, and it is the duty of this Court to effectuate that result.

Conclusion

We reverse the trial court's order denying defendant's motion to dismiss the State's application for satellite-based monitoring.

REVERSED.

Judges CALABRIA and MURPHY concur.

1. Both parties correctly note that defendant's motion for a "directed verdict" should have been more properly characterized as a "motion for involuntary dismissal" pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017). *See Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800 ("When a motion to dismiss under Rule 41(b) is incorrectly designated as one for a directed verdict, it may be treated as a motion for involuntary dismissal.") (citation omitted).

STATE v. HINNANT

[255 N.C. App. 785 (2017)]

STATE OF NORTH CAROLINA
v.
RICKY LEE HINNANT, DEFENDANT
AND
TERRENCE C. RUSHING, BAIL AGENT
AND
AGENT ASSOCIATES INSURANCE, L.L.C., SURETY

No. COA16-1293

Filed 3 October 2017

Penalties, Fines, and Forfeitures—bond forfeiture—actual notice before executing bail bond—failure to appear on two or more prior occasions

The trial court was statutorily barred under N.C.G.S. § 15A-544.5 from setting aside a bond forfeiture where a bail agent had actual notice from a properly marked release order, before executing a bail bond, that defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed.

Judge TYSON dissenting.

Appeal by Wilson County Board of Education from order entered 12 September 2016 by Judge John J. Covolo in District Court, Wilson County. Heard in the Court of Appeals 7 August 2017.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, Plaintiff-Appellant.

No brief for Ricky Lee Hinnant, Defendant-Appellee.

No brief for Terrence C. Rushing, Bail Agent.

No brief for Agent Associates Insurance, L.L.C., Defendant-Appellee Surety.

McGEE, Chief Judge.

The Wilson County Board of Education ("the Board of Education")[1] appeals from an order allowing a motion to set aside a bond forfeiture filed by Terrence C. Rushing ("Bail Agent") on behalf of Agent Associates Insurance, L.L.C. ("Surety"). Because the record on appeal indicates that, at the time Surety posted the bond, it had actual notice that defendant Ricky Lee Hinnant ("Defendant") had failed to appear in the same matter on at least two prior occasions, the trial court was prohibited by statute from setting aside the bond forfeiture. Accordingly, we reverse.

I. Background

Defendant failed to appear in Wilson County Criminal District Court on 23 October 2015 on charges of driving while impaired. As a result of Defendant's failure to appear, an order was issued for his arrest on 26 October 2015. On the order for arrest, a box was checked indicating "[t]his [was] [] [D]efendant's second or subsequent failure to appear on these charges." Defendant was served with the order for arrest on 6 January 2016 and released the same day on a secured bond posted by Bail Agent in the amount of $16,000.00. Defendant's 6 January 2016 release order also explicitly indicated "[t]his was [] [D]efendant's second or subsequent failure to appear in this case."

When Defendant again failed to appear in the same case on 15 April 2016, the trial court ordered the bond forfeited, with a final judgment date of 15 September 2016. Notice of the forfeiture was given to Bail Agent and Surety on 18 April 2016.[2]

Bail Agent filed a motion to set aside the forfeiture ("the motion to set aside") on 15 August 2016, on the basis that "[D]efendant ha[d] been surrendered by a surety on the bail bond as provided by [N.C. Gen. Stat. §] 15A-540[.]" At a 12 September 2016 hearing on the motion to set aside, Bail Agent presented a letter from Deputy J.D. McLaughlin ("Deputy McLaughlin") of the Wilson County Sheriff's Office, in which Deputy McLaughlin stated:

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1. "The Board's status as appellant in the instant case is due to its status as the ultimate recipient of the 'clear proceeds' of the forfeited appearance bond at issue herein, pursuant to Article IX, § 7 of the North Carolina Constitution." *State v. Dunn*, 200 N.C. App. 606, 607 n.1, 685 S.E.2d 526, 527 n.1 (2009) (citation omitted).

2. Notice of a bond forfeiture is effective when the notice is mailed. N.C. Gen. Stat. § 15A-544.4(d) (2015). "A forfeiture becomes a final judgment of forfeiture on the 150th day after notice of forfeiture is given, unless a motion to set aside the forfeiture is either entered on or before or is pending on that date." *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48-49, 612 S.E.2d 148, 151 (2005) (citing N.C. Gen. Stat. § 15A-544.6).

> On [26 April 2016] Terrance [sic] Rushing[,] a Bondsmen [sic] for Wilson County brought [Defendant] to [the] magistrate's office on case 14cr054745 to surrender. As I took [Defendant] to the jail I saw [Bail Agent] taking the surrender form to the Wilson County Jail Control Room to drop off.

The trial court found "that the moving party ha[d] established one or more of the reasons specified in [N.C. Gen. Stat. §] 15A-544.5 for setting aside that forfeiture" and allowed the motion to set aside. The Board of Education appeals.

II. Motion to Set Aside Bond Forfeiture

The Board of Education contends the trial court was statutorily barred from setting aside the bond forfeiture in the present case and that no competent evidence supported the trial court's decision to set aside the bond forfeiture. We agree.

A. *Standard of Review*

In an appeal from an order setting aside a bond forfeiture, "the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted); *see also* N.C. Gen. Stat. § 15A-544.5(h) (2017) (providing in part that "[a]n order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions."). Questions of law, including matters of statutory construction, are reviewed *de novo*. *See In re Hall*, 238 N.C. App. 322, 324, 768 S.E.2d 39, 41 (2014) (citation omitted) ("Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*[.]").

B. *Analysis*

"The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C. Gen. Stat.] § 15A-544.5." *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 15A-544.5(a) (2017) (stating in part that "[t]here shall be no relief from a forfeiture except as provided in this section."). In addition to enumerating the circumstances in which a

bond forfeiture must be set aside, including where "[t]he defendant has been surrendered by a surety on the bail bond as provided by [N.C.G.S. §] 15A-540," *see* N.C. Gen. Stat. § 15A-544.5(b)(3) (2017), the statute explicitly prohibits a court from setting aside a bond forfeiture "*for any reason in any case* in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." N.C. Gen. Stat. § 15A-544.5(f) (2017) (emphasis added). N.C.G.S. § 15A-544.5(f) further provides:

> Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated *on the defendant's release order* by a judicial official. The judicial official shall indicate on the release order when it is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

Id. (emphasis added).

In *State v. Adams*, 220 N.C. App. 406, 725 S.E.2d 94 (2012), a surety challenged the trial court's finding that, pursuant to N.C.G.S. § 15A-544.5(f), the surety had actual notice that the defendant had failed to appear on two or more prior occasions before executing a bail bond. In that case, the surety "[did] not dispute that [the] defendant's release order contain[ed] an explicit finding that [the] 'defendant was arrested or surrendered after failing to appear in a prior release order . . . two or more times in this case.' " *Id.* at 410, 725 S.E.2d at 96. The surety instead contended that it had conducted its own independent investigation and "determined that [the] defendant had only forfeited a bond once previously[.]" *Id.* The surety argued that because the court system's computerized database did not contain information about one of the defendant's prior failures to appear, "its agent should have been free to disregard the finding on the [defendant's] release order." *Id.*

This Court held that the "surety's reasoning [was] inconsistent with the plain language of N.C. Gen. Stat. § 15A-544.5(f)[,]" because under the statute, "it is only a defendant's failure to appear in court that is relevant to the judicial official who is entering a release order[,]" not the number of bond forfeitures or orders for arrest. *Id.* We concluded that, "[s]ince [the] defendant's release order included a finding . . . which reflected that he had previously failed to appear on two or more occasions, the trial court properly found that [the] surety had actual notice as defined by N.C. Gen. Stat. § 15A-544.5(f)." *Id.* at 410, 725 S.E.2d at 97.

Similarly, in the present case, both the 26 October 2015 order for Defendant's arrest and the 6 January 2016 release order explicitly indicated that "[t]his [was] [] [D]efendant's second or subsequent failure to appear" on these charges. Thus, applying the plain language found in N.C.G.S. § 15A-544.5(f), Bail Agent "had actual notice before executing [the] bail bond that [] [D]efendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." Accordingly, the trial court lacked authority to set aside the forfeiture "for any reason." The evidence presented by Bail Agent at the hearing on the motion to set aside – Deputy McLaughlin's letter stating that Bail Agent had surrendered Defendant – was immaterial, because the language found in N.C.G.S. § 15A-544.5(f) is unequivocal. *See*, *e.g.*, *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) ("Courts must give an unambiguous statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." (citation, quotation marks, and brackets omitted)).

According to the dissenting opinion, *Adams* is distinguishable from the present case because, in *Adams*, "no issue was asserted [before the trial court as to] whether the surety had seen, read, or had 'actual notice' of the [defendant's] release order[,]" because the surety "acknowledged that [it] had conducted an independent investigation to determine the veracity of the notation on the [defendant's] release order [indicating two or more prior failures to appear][.]" However, in *Adam*s, this Court explicitly held that the efforts undertaken by the surety were inapposite with respect to the "actual notice" requirement in N.C.G.S. § 15A-544.5(f). The singular fact that "[the] defendant's prior failures to appear were noted on his release order . . . supported the trial court's finding that [the] surety had actual notice as defined by N.C. Gen. Stat. § 15A-544.5(f)."[3] *Adams*, 220 N.C. App. at 411, 725 S.E.2d at 97.

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3. This Court recently reached a similar conclusion in an unpublished decision, *State v. Daniel*, ___ N.C. App. ___, 784 S.E.2d 237, 2016 WL 968457 (2016). In *Daniel*, a surety "attached to its motion to set aside [documentation showing that the defendant] had been served with an order of arrest for failure to appear, thus establishing a basis for set aside under [N.C.G.S. §] 15A-544.5(b)(4)." *Id.*, 2016 WL 968457 at *2.

> However, also before the district court at the hearing [on the motion to set aside] was the [defendant's] second release order, indicating that [the defendant's] 22 October 2014 failure to appear was "a second or subsequent failure to appear" in the same matter. Under the plain language of subsection (f), this notation on the second release order constituted actual notice to the [s]urety that [the defendant] had previously failed to appear

The dissenting opinion also submits that the Board of Education did not meet its burden of showing that Surety or Bail Agent had *actually seen* Defendant's release order such that they were aware that a box was checked indicating Defendant's prior failures to appear. However, that is not what the statute requires and is unsupported by its legislative history. The version of N.C.G.S. § 15A-544.5(f) in effect prior to 1 January 2010 provided:

> In any case in which *the State proves* that the surety or the bail agent had *notice or actual knowledge*, before executing the bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.

See N.C. Session Law 2009-437 (eff. 1 January 2010) (emphases added); *see also State v. Poteat*, 163 N.C. App. 741, 746-47, 594 S.E.2d 253, 256 (2004) (construing the term "notice," in version of N.C.G.S. § 15A-544.5(f) then in effect, "to include constructive, as well as actual notice[,]" and concluding professional bondsman "through the exercise of proper diligence could have readily discovered the earlier bond forfeiture notices, arrest warrants, and orders for [the defendant's] arrest, any of which would have indicated that [the defendant] had a second prior failure to appear.").

During the 2009-2010 legislative session, our General Assembly amended N.C.G.S. § 15A-544.5(f) in several ways that inform our holding in the present case. Significantly, the General Assembly eliminated the "burden of proof" previously imposed upon the State to show notice by a surety or bail agent. It also replaced the phrase "notice or actual knowledge" with the current requirement of "actual notice," and *expressly defined* "actual notice" *for purposes of the statute*. S*ee Pelham Realty Corp. v. Bd. of Transportation*, 303 N.C. 424, 434, 279 S.E.2d 826, 832 (1981) ("It is within the power of the [L]egislature to define a word used in a statute, and that statutory definition controls the interpretation of that statute." (citations omitted)). We do not, as the dissenting opinion contends, read the requirement of "actual notice" in N.C.G.S. § 15A-544.5(f) as encompassing "constructive" or "record" notice. We instead follow the exact wording of the statute as amended, under which a properly

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> at least twice in the same matter, and, accordingly, deprived the district court of authority to set aside the bond forfeiture "*for any reason*[.]"

Id. (quoting N.C.G.S. § 15A-544.5(f)) (emphasis in original). While *Daniel* is not controlling precedent, we find its reasoning persuasive. *See, e.g.*, *State v. Foster*, 222 N.C. App. 199, 204, 729 S.E.2d 116, 120 (2012).

marked release order is *per se* sufficient evidence of "actual notice." The State is not required to produce any additional evidence – including evidence that the surety or bail agent actually saw the release order before executing the bail bond. We stress that the question of whether a trial court, in applying N.C.G.S. § 15A-544.5(f), may consider evidence that, *notwithstanding a properly marked release order*, a surety or bail agent was prevented in some way from discovering a defendant's prior failures to appear is not presently before us.

We disagree with the dissenting opinion that "[n]othing in the record indicates whether the parties presented evidence at the hearing . . . of whether Surety or Bail Agent had 'actual notice' of the notation on the release order indicating Defendant's prior failures to appear." As discussed above, the Board of Education was not required to present any evidence of "actual notice" beyond the properly marked release order itself, which was contained in Defendant's case file. *See Adams*, 220 N.C. App. at 411, 725 S.E.2d at 97 ("The trial court's finding . . . that [the] defendant had failed to appear on two prior occasions was supported by competent evidence, because *[the] defendant's shuck demonstrated* that he had failed to appear [on two prior dates]." (emphasis added)). Moreover, the narration of the trial court proceedings submitted by the Board of Education – which Surety did not challenge – indicates that, during the hearing on the motion to set aside the forfeiture, Surety did not argue Bail Agent lacked notice of Defendant's prior failures to appear before executing the bond, and "[n]either the Board [of Education] nor Surety submitted any sworn testimony, affidavits or additional documents to the court[.]"[4] Thus, the record on appeal shows that the *only* evidence before the trial court related to the issue of notice was the *exact* evidence required to show "actual notice" under N.C.G.S. § 15A-544.5(f).[5]

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4. No transcript of the trial court hearing on Surety's motion to set aside the forfeiture appears in the record before us. However, after filing the record on appeal and its appellate brief, the Board of Education filed a motion to amend the record on appeal to add a narration of the hearing, which is permitted by our Appellate Rules and encouraged when, as in the present case, an electronic transcript of the trial court proceedings is unavailable. *See In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) ("Where a verbatim transcript of the [trial court] proceedings is unavailable, there are means . . . available for [a party] to compile a narration of the evidence, i.e., reconstructing the testimony with the assistance of those persons present at the hearing." (citation and internal quotation marks omitted)); *see also* N.C. R. App. P. 9(c)(1) (providing for narration of the evidence in record on appeal and, if necessary, settlement of record by the trial court on form of narration of the testimony). No objection was filed to the Board's motion to amend the record on appeal, and this Court allowed the motion on 7 August 2017.

5. In *Daniel*, *see supra* n.3, the appellant school board asserted on appeal that, at the hearing on the motion to set aside, the surety "[had] argued that the bail agent had not

While not dispositive, we note that Surety has taken no action at any stage of this appeal. The record on appeal was settled by operation of the Rules of Appellate Procedure after Surety took no action within the time allowed for responding to the proposed record compiled by the Board of Education. *See* N.C. R. App. P. 11(b); *see also In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) (noting that "[i]f an opposing party contended the record on appeal was inaccurate in any respect, the matter could be resolved by the trial judge in settling the record on appeal." (citation and internal quotation marks omitted)). Thereafter, only the Board of Education filed an appellate brief. Surety also did not object to the motion filed by the Board of Education to amend the record on appeal by adding a narration of the trial court hearing. *See supra* n.4-5; *see also State v. Cobb*, 2017 WL 2945860 at *3 (2017).

III. Conclusion

The record as submitted by the Board of Education "contains documentary evidence which, on its face, does not support the ruling of the trial court." *Cobb*, 2017 WL 2945860 at *3. Accordingly, we vacate the trial court's order allowing the motion to set aside the forfeiture.

VACATED.

Judge INMAN concurs.

Judge TYSON dissents with separate opinion.

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actually seen the second release order in [the defendant's] file when [the bail agent] posted the bond and thus lacked actual notice that [the defendant] had twice previously failed to appear in the same matter." *Daniel*, 2016 WL 968457 at *3. However, the record did not include a transcript of the hearing, and the trial court's order did not include any finding of fact on that issue. "Thus, the *only* competent evidence at the motion hearing conclusively established that, pursuant to N.C. Gen. Stat. § 15A-544.5(f), the district court was barred from setting aside the bond forfeiture." *Id.* (emphasis in original). The dissenting opinion reads *Daniel* as suggesting this Court *would have considered* evidence, if included in the record on appeal, that a bail agent did not actually see a defendant's release order in determining whether there was "actual notice" under N.C.G.S. § 15A-544.5(f). However, as the dissenting opinion concedes, we emphasized in *Daniel* that the record on appeal contained no evidence regarding whether the bail agent had in fact seen the relevant release order before posting the bond. The same is true in the present case. No evidence in the record before us reveals any argument by Surety that it lacked "actual notice" because Bail Agent never saw Defendant's release order. Furthermore, the narration of the hearing submitted by the Board of Education – and *unopposed by Surety* – affirmatively indicates that, at the hearing, Surety (1) did not make such an argument and (2) did not offer any evidence to the trial court other than the letter signed by Deputy McLaughlin stating Bail Agent had surrendered Defendant on 26 April 2016.

Judge TYSON, dissenting.

The majority's opinion correctly states the controlling statute to set aside a forfeiture, but erroneously concludes the substantial evidence presented by the Bail Agent to support his motion to set aside the forfeiture of an appearance bond, and the trial court's findings of fact thereon, "[were] immaterial because the language found in N.C.G.S. § 15A-544.5(f) is unequivocal." As a result, the majority's opinion concludes 'the trial court lacked authority to set aside the forfeiture 'for any reason.' " The Board of Education failed to present any evidence to support its opposition to the Bail Agent's motion. I disagree with the majority opinion and respectfully dissent.

The record establishes Defendant was charged with driving while impaired in Wilson County File No. 14 CRS 54745, and that a secured appearance bond was set at $16,000, for which Bail Agent posted bond. Defendant failed to appear in court on the scheduled trial date of 15 April 2016. The trial court ordered forfeiture of the bond, and Bail Agent and Surety received notice of the forfeiture.

On 15 August 2016, Bail Agent timely moved to have the bond forfeiture set aside on the basis that "[D]efendant ha[d] been surrendered by a surety on the bail bond as provided by [N.C. Gen. Stat. §] 15A-540[.]" The Bail Agent's motion and evidence of his surrender of Defendant to Deputy McLaughlin established a *prima facie* showing under the statute that Defendant had been surrendered and the Surety and Bail Agent were entitled to relief from forfeiture. N.C. Gen. Stat. § 15A-540 (2015).

The Board of Education objected to Bail Agent's motion to set aside the forfeiture of the bond. The Board of Education has appealed from the trial court's order of relief from forfeiture, which was based on the trial court's finding of fact that Bail Agent had established the existence of one or more statutorily-permissible reasons for setting aside the bond forfeiture. The proper issue before this Court, and not addressed by the majority's opinion, is whether the findings of fact and conclusions of law in the trial court's order were supported by evidence adduced at the hearing conducted by the trial court.

I. Standard of Review

"The standard of review on appeal where a trial court sits without a jury is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Lazaro*, 190 N.C. App. 670, 671, 660 S.E.2d

618, 619 (2008) (citation omitted). N.C. Gen. Stat. § 15A-544.5(h) states that an "order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions."

The Board of Education is the appellant and "it is generally the *appellant's duty and responsibility* to see that the record is in proper form and complete and this Court will not presume error by the trial court when none appears on the record to this Court." *King v. King*, 146 N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001) (internal quotation omitted) (emphasis supplied).

It is undisputed that "[i]n North Carolina, forfeiture of an appearance bond is controlled by statute." *State v. Robertson*, 166 N.C. App. 669, 670, 603 S.E.2d 400, 401 (2004). "If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2015). "The exclusive avenue for relief from forfeiture of an appearance bond . . . is provided in G.S. § 15A-544.5. The reasons for setting aside a forfeiture are those specified in subsection (b)[.]" *Robertson*, 166 N.C. App. at 670-71, 603 S.E.2d at 401. N.C. Gen. Stat. § 15A-544.5 "clearly states that 'there shall be no relief from a forfeiture' except as provided in the statute, and that a forfeiture 'shall be set aside for any one of the [reasons set forth in Section (b)(1-6)], and none other.' " *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005).

II. N.C. Gen. Stat. § 15A-544

N.C. Gen. Stat. § 15A-544.5 provides in relevant part that the procedure governing a surety's request to have a bond forfeiture set aside is as follows:

> (1) . . . [A]ny of the following parties on a bail bond may make a written motion that the forfeiture be set aside: . . . Any surety. . . . a bail agent acting on behalf of an insurance company. The written motion shall state the reason for the motion and attach to the motion the evidence specified in subsection (b) of this section.
>
> (2) The motion shall be filed in the office of the clerk of superior court[.] . . . The moving party shall, under G.S. 1A-1, Rule 5, serve a copy of the motion on the district attorney for that county and on the attorney for the county board of education.

> (3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.
>
> (4) If neither the district attorney nor the attorney for the board of education has filed a written objection to the motion by the twentieth day after a copy of the motion is served by the moving party . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either.
>
> (5) If either the district attorney or the county board of education files a written objection to the motion, then . . . a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.
>
> (6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.
>
> (7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture[.]
>
> (8) If at the hearing the court determines that the motion to set aside was not signed or that the documentation required to be attached pursuant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional. . . .

N.C. Gen. Stat. § 15A-544.5 prohibits a court from setting aside a bond forfeiture "for any reason in any case in which the surety or the *bail agent had actual notice before executing a bail bond* that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." N.C. Gen. Stat. § 15A-544.5(f) (emphasis supplied). N.C. Gen. Stat. § 15A-544.5(f) further provides:

> Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official. The judicial official shall indicate on the release order when it

> is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

The Board of Education, as appellant, failed to include any audio recordings or transcripts of testimony presented at the hearing in the record on appeal. The Board of Education tendered a *post hoc* narrative summarizing the events of the bond forfeiture hearing. Addressing whether the trial court was statutorily prohibited by N.C. Gen. Stat. § 15A-544.5(f) from granting the motion to set aside the forfeiture, the narrative asserts:

> [Board's attorney] further stated that the bond at issue was a Bond C and that Surety had actual notice that the criminal defendant had failed to appear on two or more previous occasions in the case. [Board's attorney] stated that, based on these facts, notwithstanding any grounds to set aside under § 15A-544.5(b)(3), the court was statutorily prohibited from granting the motion to set aside for any reason pursuant to N.C. Gen. Stat. § 15A-544.5(f).

Statements of counsel to the court are not competent evidence to support or reverse the trial court's order. *See State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) (holding "counsel's statements were not competent evidence[.]"). The majority opinion characterizes N.C. Gen. Stat. § 15A-544.5(f) as being "unambiguous" regarding when a surety or bail agent has actual notice of the release order. I disagree.

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.").

Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N.C. Dep't of Health & Human Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006).

"[T]he language of a statute will be interpreted so as to avoid an absurd consequence. A statute is never to be construed so as to require

an impossibility if that result can be avoided by another fair and reasonable construction of its terms." *Hobbs v. County of Moore*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966) (citations and quotation marks omitted).

The majority opinion interprets the statutory language of "[a]ctual notice . . . shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official" in the statute to conclude a bail agent has received "actual notice" a defendant has failed to appear on two or more prior occasions, if the box checked on the release order so indicates, regardless of whether the bail agent actually saw the release order. Interpreting "actual notice," as the majority opinion does, would change "actual notice" to mean "constructive" or "record" notice. N.C. Gen. Stat. § 15A-544.5(f). "Actual" is defined as "existing in fact or reality[.]" *The American Heritage College Dictionary* 77 (2d ed. 1982). The phrase "actual notice" has been defined as "the actual awareness or direct notification of a specific fact or proceeding to a person." USLegal, *Definitions*, "Actual Notice Law and Legal Definition," http://definitions.uslegal.com/a/actual-notice/ (last visited Sept. 11, 2017).

"[T]o charge one with notice, the activating information known to the party sought to be charged must ordinarily be such as may reasonably be said to excite inquiry respecting the particular fact or facts necessary to be disclosed in order to fix the party charged with notice." *Perkins v. Langdon*, 237 N.C. 159, 168, 74 S.E.2d 634, 642 (1953) (citations omitted). "[I]mplicit in the principles that underlie the doctrine of constructive notice is the concept that before one is affected with notice of whatever reasonable inquiry would disclose, the circumstances must be such as to impose on the person sought to be charged a duty to make inquiry." *Id.* at 168, 74 S.E.2d at 642 (citations omitted).

The General Assembly's specific choice of "actual notice," and not "constructive" or "record" notice, in N.C. Gen. Stat. § 15A-544.5(f) is evident from the legislative history. Before 1 January 2010, N.C. Gen. Stat. § 15A-544.5(f) read as follows:

> (f) No More Than Two Forfeitures May Be Set Aside Per Case. -- In any case in which the State proves that the surety or the bail agent had *notice or actual knowledge*, before executing a bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.

N.C. Gen. Stat. § 15A-544.5(f) (2009) (emphasis added), *amended by* 2009 N.C. Sess. Laws 2009-437.

This Court had interpreted "notice" in the prior statute to encompass "constructive," as well as "actual," notice to comply with the former version of N.C. Gen. Stat. § 15A-544.5(f). *See State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d 253, 256 (2004) ("We conclude that construing the term 'notice' in N.C. Gen. Stat. § 15A-544.5(f) to include constructive, as well as actual, notice is in harmony with this statute's purpose.")

To construe "actual notice" in the current version of N.C. Gen. Stat. § 15A-544.5(f) to encompass "constructive" or "record" notice would create an "absurd consequence" in light of the plain language of the statute and the legislative history showing the statute was amended to specifically require the bail agent to have received "actual notice" versus the more general "notice or actual knowledge." See 2009 N.C. Sess. Laws 2009-437 (amending "notice" in § 15A-544.5(f) to "actual notice"); *Hobbs*, 267 N.C. at 671, 149 S.E.2d at 5 ("[T]he language of a statute will be interpreted so as to avoid an absurd consequence.").

The majority opinion cites two cases to support its interpretation of N.C. Gen. Stat. § 15A-544.5(f), *State v. Adams* and *State v. Daniel*, an unpublished case. Neither case controls the issues before us.

This Court held in *State v. Adams*, 220 N.C. App. 406, 410-11, 725 S.E.2d 94, 97 (2012), competent evidence was presented and supported the trial court's finding that the surety had received "actual notice," as defined by N.C. Gen. Stat. § 15A-544.5(f), because the defendant's prior failures to appear were noted on his release order. However, the majority opinion's use of *Adams* to read "actual notice" as encompassing "constructive" or "implied" notice in N.C. Gen. Stat. § 15A-544.5(f) to vacate the trial court's order before us is inapposite.

In *Adams*, no issue was asserted whether the surety had seen, read, or had "actual notice" of the release order. *See Adams* at 410, 725 S.E.2d at 96. The surety acknowledged that its bail agent had conducted an independent investigation to determine the veracity of the notation on the release order that "defendant had already failed to appear on two or more occasions" before the surety executed the defendant's surety bond. *Id.* at 409, 725 S.E.2d at 96. *Adams* does not support the conclusion to vacate here.

This Court in *State v. Daniel*, ___ N.C. App. ___, 784 S.E.2d 237, 2016 WL 968457 (2016) (unpublished) held the district court was deprived of authority to set aside a bond forfeiture, where the defendant's release order indicated the defendant had failed to appear on two or more occasions. *Daniel*, 2016 WL 968457 at *2. However, in *Daniel*, this Court implied it would have considered evidence that the surety's bail agent

did not see the defendant's release order before the bail agent posted bond as pertinent to the issue of whether the surety had "actual notice". *Id.* This Court in *Daniel* noted that competent evidence indicating the bail agent had not seen the release order was not included in the record and declined to address whether the surety had received actual notice on that basis. *Id.* *3. *Daniel* is also an unpublished case and does not constitute binding precedent upon this Court. N.C. R. App. P. 30(e)(3).

The Board of Education has not met its statutory burden to produce evidence to show Surety or Bail Agent had received "actual notice" of the release order so that they were apprised that one of the boxes on it was checked to indicate, this was "defendant's second or subsequent failure to appear in this case." *See* N.C. Gen. Stat. § 15A-544.5(f) ("Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official").

Given the total absence of anything in the record, other than counsel's statements, of the evidence presented to the trial court showing whether the Surety or Bail Agent had received "actual notice" of the release order, any conclusion reached by this Court regarding the merits of the trial court's order will, of necessity, be based upon implication, assumption, or speculation. The majority opinion's holding is based upon the presumption that the trial court erred by not finding Bail Agent had actual notice in the absence of any evidence of proof. This is an intolerable burden for an appellee to meet and is wholly inconsistent with our standard of review.

The long-standing rule of our appellate courts demands we not presume error upon a silent record. "[W]here the record is silent on a particular point, it will be presumed that the trial court acted correctly." *State v. Thomas*, 344 N.C. 639, 646, 477 S.E.2d 450, 453 (1996) (citations omitted).

On 17 August 2016, the Board of Education filed its objection to the Bail Agent's motion, and a hearing was scheduled for 12 September 2016. Following the hearing, Judge Covolo entered an order allowing Surety's motion and setting aside the bond forfeiture, based upon a finding of fact and conclusion of law that:

> Upon due notice, a hearing was held on the above Objection to the Motion To Set Aside Forfeiture. The Court finds that on the "Date of Bond" shown on the reverse the moving party named above executed a bond for the defendant's appearance in the case(s) identified[.] . . . On the "Failure to Appear" date shown on the reverse, the defendant

> failed to appear to answer the charges in the case(s), and forfeiture of the bond was entered on that date. Notice of forfeiture was mailed to the moving party
>
> . . . .
>
> The Court finds . . . that the moving party has established one or more of the reasons specified in [N.C. Gen. Stat. §] 15A-544.5 for setting aside that forfeiture
>
> . . . .
>
> The above Motion is allowed and the forfeiture is set aside.

"[I]t is generally the appellant's duty and responsibility to see that the record is in proper form and complete and this Court will not presume error by the trial court when none appears on the record to this Court." *King*, 146 N.C. App. at 445-46, 552 S.E.2d at 265 (internal quotation omitted). Instead, "[w]here the record is silent on a particular point, we presume that the trial court acted correctly." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488-89, 586 S.E.2d 791, 795 (2003); *see also Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (noting "the well established [sic] principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court"). "The rulings, orders and judgments of the trial judge are presumed to be correct, and the burden is on the appealing party to rebut the presumption of verity on appeal." *Hocke v. Hanyane*, 118 N.C. App. 630, 635, 456 S.E.2d 858, 861 (1995) (citation, alteration, and quotation marks omitted).

The only relevant issue on appeal before this Court is whether the trial court's findings of fact and conclusions of law in the order were properly entered in light of the competent evidence adduced at the hearing. The Board of Education produced no evidence, to contradict the Bail Agent's competent and substantive evidence at the hearing, only statements of counsel.

The Board's *post hoc* narrative summarizing the events of the hearing contains nothing to show the Board of Education presented any evidence of the Bail Agent or Surety having received "actual notice" or seeing the release order before executing the bail bond. In the course of settling the record on appeal, pursuant to N.C. R. App. P. 11, the Board of Education could have submitted an affidavit from the appellant's trial counsel regarding the evidence the Board and Surety submitted at the hearing, or if the parties agreed on the evidentiary history of this matter, they might have stipulated to the identity of the documents or testimony offered at the hearing. Alternatively, the appellant could have filed

a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b) (2015), asking the court to "amend its findings or make additional findings[.]"

Nothing in the record indicates whether Surety or Bail Agent had received "actual notice" of the notation on the release order indicating Defendant's prior failures to appear. " 'The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error.' Unless the record reveals otherwise, we presume 'that judicial acts and duties have been duly and regularly performed.' " *In re A.R.H.B.*, 186 N.C. App. 211, 219, 651 S.E.2d 247, 253 (2007) (quoting *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985), and *Lovett v. Stone*, 239 N.C. 206, 212, 79 S.E.2d 479, 483 (1954)). It was the Board's duty as the appellant,

> and not the duty of this Court, to challenge findings and conclusions, and make corresponding arguments on appeal. It is not the job of this Court to "create an appeal for" [Appellant]. . . . . "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. Th[ese] [arguments are] deemed abandoned by virtue of N.C. R. App. P. 28(b)(6)."

Sanchez v. Cobblestone Homeowners Ass'n., __ N.C. App. __, __, 791 S.E.2d 238, 245-46 (2016) (citations omitted).

We should not reach a contrary conclusion on the validity of the trial court's order, and vacate that order, without a record of what evidence the parties presented at the hearing regarding the Bail Agent or Surety's "actual notice."

III. Conclusion

In the absence of any record of the proceedings before the trial court showing what evidence was, or was not, presented, the Board has failed to meet its burden to show error in the trial court's order. This Court has, until now, consistently followed the well-established rule and has not presumed that the trial court has erred and vacated its order in the absence of a showing of any error by the appellant. *Granville*, 160 N.C. App. at 488-89, 586 S.E.2d at 795.

The Board of Education has failed to meet its burden on appeal to show error, or to rebut the Bail Agent's *prima facie* showing of entitlement to relief under the statute based upon competent evidence. The record contains no evidence upon which we can undermine the validity

of the trial court's ruling. The majority's opinion avoids any analysis of the Board's burden on appeal.

Our consistent precedents require us to presume the trial court's findings of fact and conclusions of law are properly supported and correct, and to affirm the trial court's order. *See id.*; *see also In re A.R.H.B.*, 186 N.C. App. at 219, 651 S.E.2d at 253; *King*, 146 N.C. App. at 445-46, 552 S.E.2d at 265; *Hocke*, 118 N.C. App. at 635, 456 S.E.2d at 861. For these reasons, I vote to affirm the trial court's order and respectfully dissent.

STATE OF NORTH CAROLINA
v.
ANTONIO JERMAINE KNIGHT, JR., DEFENDANT AND ONTARRIS T. ARMSTRONG, BAIL AGENT, AND FINANCIAL CASUALTY & SURETY, SURETY

No. COA17-19

Filed 3 October 2017

Penalties, Fines, and Forfeitures—reduction of bond forfeiture—denial of motion to set aside—no statutory authority

The trial court lacked statutory authority under N.C.G.S. § 15A-544.5 to reduce a bond forfeiture amount after denying a surety's motion to set aside the bond forfeiture. The only relief it could grant was the setting aside of the forfeiture based on the enumerated statutory reasons.

Appeal by Wilson County Board of Education from order entered 3 October 2016 by Judge William C. Farris in District Court, Wilson County, following a hearing the same date before Judge John J. Covolo. Heard in the Court of Appeals 7 August 2017.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, Plaintiff-Appellant.

No brief for Antonio Jermaine Knight, Jr., Defendant.

No brief for Ontarris T. Armstrong, Bail Agent.

Harris & Associates, P.L.L.C., by Robert J. Harris, for Financial Casualty & Surety, Defendant-Appellee Surety.

McGEE, Chief Judge.

The Wilson County Board of Education ("the Board of Education")[1] appeals from the trial court's order reducing a bond forfeiture amount after denying a surety's motion to set aside the bond forfeiture. Because we conclude the trial court lacked statutory authority to reduce the bond forfeiture amount, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. Background

Antonio Jermaine Knight ("Defendant") failed to appear in Wilson County District Court in an underlying criminal matter on 11 March 2016. The Wilson County Clerk of Court issued a bond forfeiture notice in the amount of $2,000.00 to Defendant, Financial Casualty & Insurance ("Surety"), and Surety's bail agent, Ontarris T. Armstrong ("Bail Agent"), on 14 March 2016. Notice was mailed to all parties on 17 March 2016.

Clarence Fuller, another bail agent of Surety, filed a motion to set aside the bond forfeiture ("the motion to set aside") on 15 August 2016. Form AOC-CR-213, the preprinted form used for motions to set aside a forfeiture, lists the seven reasons, pursuant to N.C. Gen. Stat. § 15A-544.5, for which a bond forfeiture may be set aside, with corresponding boxes for a movant to mark the alleged basis for setting aside the forfeiture. In the present case, the motion to set aside filed by Surety's bail agent did not indicate Surety's reason for setting aside the forfeiture. A document attached to the motion, entitled "General Court of Justice (*Surety Notice of Defendant's Incarceration*)," indicated that Defendant was incarcerated on 2 August 2016 with a projected release date of 5 October 2016. The Board of Education objected to the motion to set aside the forfeiture on 17 August 2016.

Following a hearing on 3 October 2016, the trial court denied Surety's motion to set aside the bond forfeiture, based on its finding that Surety "ha[d] [not] established one or more of the reasons specified in [N.C.G.S. §] 15A-544.5 for setting aside [the] forfeiture." In accordance with N.C.G.S. § 15A-544.5(d)(7) (2017), the trial court's order provided that "the forfeiture shall become a final judgment of forfeiture on the later of this date or one hundred and fifty (150) days after the 'Date

1. "The Board's status as appellant in the instant case is due to its status as the ultimate recipient of the 'clear proceeds' of the forfeited appearance bond at issue herein, pursuant to Article IX, § 7 of the North Carolina Constitution." *State v. Dunn*, 200 N.C. App. 606, 607 n.1, 685 S.E.2d 526, 527 n.1 (2009) (citation omitted).

Notice Given[.]' " Despite denying the motion, the trial court verbally reduced the amount of the bond forfeiture from $2,000.00 to $300.00.[2] A handwritten notation stating "Surety to pay $300" appears on the trial court's order, also filed on 3 October 2016. Surety paid $300.00 to the clerk of court that same day. The Board of Education appeals.

II. Analysis

The Board of Education contends the trial court lacked statutory authority to reduce the amount of the bond forfeiture after denying Surety's motion to set aside the bond forfeiture. We agree.

A. *Standard of Review*

In an appeal from an order setting aside a bond forfeiture, "the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted); *see also* N.C. Gen. Stat. § 15A-544.5(h) (2015) (providing in part that "[a]n order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions."). Questions of law, including matters of statutory construction, are reviewed *de novo*. *See In re Hall*, 238 N.C. App. 322, 324, 768 S.E.2d 39, 41 (2014) (citation omitted) ("Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*[.]").

B. *Surety's Motion to Set Aside*

In North Carolina, bail bond forfeiture is governed by Chapter 15A, Article 26, Part 2 of our General Statutes. *See* N.C. Gen. Stat. § 15A-544.1

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2. No transcript of the hearing appears in the record on appeal, which was settled by operation of N.C. R. App. P. 11(b) after Surety took no action within the time allowed for responding to the proposed record on appeal. The Board of Education subsequently filed a motion to amend the record on appeal to add a narration of the trial court hearing. *See* N.C.R. App. P. 9(b)(5), 9(c)(1). No objection was filed, and this Court allowed the motion on 7 August 2017. According to the narration submitted by the Board of Education, at the hearing on the motion to set aside, an attorney for Surety "did not argue that any of the statutory bases for set aside had been met, however, [Surety's attorney] requested that [the trial court] award some relief on the amount of the bond forfeiture to be paid." After hearing arguments from both parties, the trial court "found that Surety had not established the grounds for set aside under N.C. Gen. Stat. § 15A-544.5 and denied Surety's motion. However, Judge Covolo then ordered [] Surety to pay a reduced bond forfeiture amount of $300.00."

(2017) ("By executing a bail bond the defendant and each surety submit to the jurisdiction of the court[.] . . . The liability of the defendant and each surety may be enforced as provided in this Part[.]"). "If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture *for the amount of that bail bond* in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2017) (emphasis added).

N.C. Gen. Stat. § 15A-544.5 (2017) provides that "[t]here shall be no relief from a forfeiture except as provided in this section." *See State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) ("The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C.]G.S. § 15A-544.5." (citation and quotation marks omitted) (internal parentheses in original)). The statute's language is unequivocal: "a forfeiture *shall* be set aside for any one of the following [seven] reasons, *and none other*."[3] N.C. Gen. Stat. § 15A-544.5(b) (2017) (emphases added); *see also State v. Rodrigo*, 190 N.C. App. 661, 664, 660 S.E.2d 615, 617 (2008) ("Relief from a forfeiture, before the forfeiture becomes a final judgment, is exclusive and limited to the reasons provided in N.C. Gen. Stat. 15A-544.5.").

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3. Although not directly at issue in the present case, the exclusive reasons for which a bond forfeiture may be set aside are as follows:

> (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.
>
> (2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.
>
> (3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.
>
> (5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.
>
> (6) The defendant was incarcerated in a unit of the Division of Adult Correction *and Juvenile Justice* of the Department of Public Safety and

In the present case, it is undisputed that Surety's motion was a motion to set aside a bond forfeiture filed pursuant to N.C.G.S. § 15A-544.5. Surety filed a Form AOC-CR-213, the form used for motions to set aside a bond forfeiture under N.C. Gen. Stat. § 15A-544.5(d)(1) (2017), and did so before a final judgment of forfeiture was entered. The trial court's order explicitly stated that the motion was denied based on the court's finding that Surety "[failed to establish] one or more of the reasons specified in [N.C.G.S. §] 15A-544.5 for setting aside that forfeiture." Accordingly, we agree with the Board of Education that N.C. Gen. Stat. § 15A-544.5 is the controlling statute in this appeal.

On appeal, the Board of Education does not challenge the trial court's denial of Surety's motion to set aside, since, the Board contends, Surety failed to establish any of the seven exclusive statutory reasons for which a bond forfeiture may be set aside. *See supra* n.3. In response, Surety does not argue that its motion to set aside s*hould have been allowed* because it *did* satisfy one or more of the reasons set forth in N.C.G.S. § 15A-544.5. Surety instead asserts the trial court "in its discretion reduced the bond forfeiture [amount] from $2000 to $300; thus, *granting* the [m]otion to [s]et [a]side the bond forfeiture *in part*." (emphases added). In making this argument, Surety improperly relies upon N.C. Gen. Stat. § 15A-544.8, the statute that sets forth a distinct procedure for seeking relief from *final judgments* of forfeiture.[4] Because

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> is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Division of Adult Correction *and Juvenile Justice* of the Department of Public Safety or Federal Bureau of Prisons, including an electronic record.
>
> (7) The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C.G.S. § 15A-544.5(b)(1)-(7) (2017) (emphases added to indicate 2017 amendments).

4. Surety's reliance on N.C.G.S. § 15A-544.8 is misplaced because Surety filed the motion to set aside before entry of a final judgment of forfeiture occurred. "A forfeiture becomes a final judgment of forfeiture on the 150th day after notice of forfeiture is given,

the Board of Education does not challenge the trial court's conclusion that Surety failed to establish a reason for setting aside the forfeiture pursuant to N.C.G.S. § 15A-544.5, and Surety offers no argument under the relevant statute, we proceed on the presumption that the trial court properly denied the motion to set aside. *See, e.g.*, *Hocke v. Hanyane*, 118 N.C. App. 630, 635, 456 S.E.2d 858, 861 (1995) (observing that "the rulings, orders and judgments of the trial judge are presumed to be correct, and the burden is on the appealing party to rebut the presumption of verity on appeal." (citation, alteration, and quotation marks omitted)).

C. *Reduction of Bond Amount*

The sole question before us is whether the trial court had authority, pursuant to N.C.G.S. § 15A-544.5, to reduce the amount owed by Surety on the executed bond. We conclude it did not.

> In construing a statute, we must first ascertain the legislative intent to ensure that the purpose and intent of the legislation are satisfied. In making this determination, we look first to the language of the statute itself. If the language used is clear and unambiguous, this Court must not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

Bryant v. Adams, 116 N.C. App. 448, 457, 448 S.E.2d 832, 836 (1994) (citation omitted). Our Supreme Court has instructed that "[reviewing c]ourts should give effect to the words actually used in a statute and should neither delete words used nor insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citation and internal quotation marks omitted).

As discussed above, by its plain language, N.C.G.S. § 15A-544.5 provides the "exclusive" relief for setting aside a bond forfeiture that has not yet become a final judgment. *See* N.C. Gen. Stat. § 15A-544.5(a) (2017). The reasons enumerated therein for which a forfeiture may be set aside

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unless a motion to set aside the forfeiture is either entered on or before *or is pending on* that date." *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48-49, 612 S.E.2d 148, 151 (2005) (citing N.C. Gen. Stat. § 15A-544.6) (emphasis added). Notice of forfeiture is effective when the notice is mailed. N.C. Gen. Stat. § 15A-544.4 (2017). In the present case, notice of forfeiture was mailed on 17 March 2016. Surety's bail agent filed the motion to set aside on 15 August 2016, the day the forfeiture would have become a final judgment. Thus, there was a motion to set aside "pending on that date," and the forfeiture did not become a final judgment by operation of the statute.

are both mandatory and exhaustive. *See, e.g.*, *State v. Lazaro*, 190 N.C. App. 670, 673, 660 S.E.2d 618, 620 (2008) (holding trial court erred in granting surety's motion to set aside bond forfeiture because "deportation is not listed as one of the . . . exclusive grounds that allowed the court to set aside a bond forfeiture.").

The only "relief" authorized under N.C.G.S. § 15A-544.5 is the setting aside of the bond forfeiture. The statute provides that, "[i]f at the hearing the [trial] court allows the motion, the court *shall enter an order setting aside the forfeiture.*" N.C.G.S. § 15A-544.5(d)(6) (emphasis added). Conversely, if a movant fails to establish any of the reasons enumerated in N.C.G.S. § 15A-544.5, the court must deny the motion to set aside. Once a motion to set aside is denied, a final judgment date is prescribed by statute:

> If at the hearing [on the motion to set aside] the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:
>
> a. The date of the hearing.
>
> b. The date of final judgment specified in G.S. 15A-544.6.

N.C.G.S. § 15A-544.5(d)(7). There is no "partial" relief provided under the plain language of the statute.

In addition to the statutory language itself, "[o]ther *indicia* considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption[.]" *Taylor v. City of Lenoir*, 129 N.C. App. 174, 177, 497 S.E.2d 715, 718 (1998) (citation and quotation marks omitted) (second alteration in original); *but see Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 295 (1991) (advising that reviewing courts need only examine legislative history if, "after analyzing the text, structure, and policy of the statute, we are still in doubt as to legislative intent[.]" (citation omitted)).

As the Board of Education notes, our General Assembly enacted S.L. 2000-133, entitled "An Act to Modernize Bail Bond Forfeiture Proceedings[,]" during the 1999-2000 legislative session. S.L. 2000-133 repealed N.C. Gen. Stat. § 15A-544, the statute formerly governing bail bond forfeiture, and replaced it with the statutory provisions now codified at N.C.G.S. §§ 15A-544.1 through 544.8. Under former N.C.G.S. § 15A-544, trial courts had discretion to "remit" part or all of a bond forfeiture, and could do so before or after entry of a final judgment of forfeiture.

See N.C. Gen. Stat. §§ 15A-544(c), (e), (h) (repealed by S.L. 2000-133, eff. 1 January 2001). Among other things, S.L. 2000-133 created a new procedure for "setting aside" a bond forfeiture prior to the entry of a final judgment. The newly-enacted N.C.G.S. § 15A-544.5 established the "exclusive" relief from a bond forfeiture prior to the entry of final judgment, and enumerated the specific reasons for which a forfeiture "shall" be set aside, "and none other." *See* N.C.G.S. §§ 15A-544.5(a)-(b). Importantly, N.C.G.S. § 15A-544.5 omitted any reference to language found in former N.C.G.S. § 15A-544(e) that authorized a trial court to "remit" a bond forfeiture "in whole or in part, upon such conditions as the court may impose, if it appears [to the trial court] that justice requires the remission of part or all of the judgment."

By contrast, S.L. 2000-133 retained some of the discretionary language found in former N.C.G.S. § 15A-544 in establishing a separate procedure for seeking relief from *final* judgments of forfeiture. Under current N.C.G.S. § 15A-544.8, a trial court "may" grant relief from a final judgment of forfeiture if, *inter alia*, "extraordinary circumstances exist that the [trial] court, in its discretion, determines should entitle [the movant] to relief." *See* N.C.G.S. § 15A-544.8(b)(2). Additionally, N.C.G.S. § 15A-544.8 provides that, "[a]t the hearing [on a motion for relief from final judgment of forfeiture][,] the court may grant the [moving] party *any relief* from the judgment that the court considers appropriate, *including the refund of all or a part of any money paid to satisfy the judgment*." *See* N.C.G.S. § 15A-544.8(c)(4) (emphases added). These provisions echo language found in former N.C.G.S. § 15A-544(h), which provided that, "[f]or extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate." *See State v. Lopez*, 169 N.C. App. 816, 820, 611 S.E.2d 197, 199 (2005) (observing that language in N.C.G.S. § 15A-544.8, granting trial courts broader discretion in providing relief from final judgments of forfeiture, "also appeared in the predecessor statute (N.C. Gen. Stat. § 15A-544(e) and (h)), [and] requires that we review such decisions [only] for an abuse of discretion." (citation omitted) (internal parentheses in original)).

We agree with the Board of Education that the General Assembly's decision to omit discretionary language with respect to motions to set aside, and retain such language with respect to final judgments of forfeiture, "suggests the [L]egislature made a conscious choice in this regard." *See State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005); *see also Long v. Hammond*, 164 N.C. App. 486, 497, 596 S.E.2d 839, 846

(2004) (finding construction of one statutory section as not requiring the element of intent was bolstered by the fact that another section, within the same article and amended at the same time, "[*did*] possess an element of intent. We credit the [L]egislature with deliberate composition of its statutes unless there is some construction and policy concern sufficient to raise an ambiguity." (emphasis added)). We are persuaded that, considered together, the plain language used in N.C.G.S. § 15A-544.5 and the statute's legislative history demonstrate that the General Assembly intended to limit a trial court's authority in setting aside a bond forfeiture before the entry of a final judgment.

Under N.C.G.S. § 15A-544.5, a trial court may only grant relief from a forfeiture for the reasons listed in the statute, and the only relief it may grant is the setting aside of the forfeiture. *Cf. Lopez*, 169 N.C. App. at 819, 611 S.E.2d at 199 (noting that whether to grant relief under N.C.G.S. § 15A-544.8 is "entirely within the discretion of the [trial] court[.]"). The trial court must either allow the motion and set aside the bond forfeiture in its entirety, or deny the motion to set aside, in which case the original forfeiture will become a final judgment in accordance with the relevant statutory provisions. *See* N.C.G.S. §§ 15A-544.5(d)(6)-(7), 15A-544.6. Once the forfeiture becomes a final judgment, a party may initiate a new proceeding seeking relief pursuant to N.C.G.S. § 15A-544.8.

In *State v. Cortez*, 215 N.C. App. 576, 715 S.E.2d 881 (2011), this Court held that a trial court lacked jurisdiction "to enter and affirm [] second orders of forfeiture[,]" because

> the Sureties would currently be liable for two separate failures to appear and, therefore, liable for two times the actual amount of the bonds executed in [the] [d]efendant's case . . . [and] the Sureties *may not be held liable for more than the amount agreed upon pursuant to the bonds they actually executed*[.]

Id. at 580, 715 S.E.2d at 884 (emphasis added). We now hold that, when a motion to set aside a forfeiture is denied under N.C.G.S. § 15A-544.5, an obligor also may not be held liable for *less than* the amount agreed upon pursuant to the bond it actually executed. A conclusion to the contrary would contravene the Legislature's demonstrated intent to divest the trial courts of *discretionary* authority to modify bond forfeitures before entry of final judgment occurs, and "result[] in unnecessary inefficiencies and confusion." *Id.*; *see also State v. Evans*, 166 N.C. App. 432, 434, 601 S.E.2d 877, 878 (2004) (observing that, unlike a trial court's grant of relief from a final judgment of forfeiture under N.C.G.S. § 15A-544.8, "the

setting aside of a forfeiture that has not become final *imposes no burden on any party*[.]" (emphasis added)).

We also note that allowing a trial court to deny a motion to set aside a bond forfeiture, but reduce the amount owed on the bond, would undermine the purpose of bail, "which is to secure the appearance of the principal in court as required." *State v. Hollars*, 176 N.C. App. 571, 574, 626 S.E.2d 850, 853 (2006) (citation and internal quotation marks omitted). The prospect of a bond reduction, notwithstanding forfeiture, could create a disincentive for sureties and their agents to "diligently pursue defendants." *See State v. Coronel*, 145 N.C. App. 237, 247, 550 S.E.2d 561, 568 (2001).

In the present case, the trial court denied Surety's motion to set aside based on its finding that no reason existed pursuant to N.C.G.S. § 15A-544.5 to set aside the forfeiture. Having denied the motion to set aside, the trial court had no authority to grant "partial relief" by reducing the amount owed on the bond.

III. Conclusion

Because we find no statutory basis upon which a trial court may deny a motion to set aside a bond forfeiture pursuant to N.C.G.S. § 15A-544.5, but reduce the amount owed on the executed bond, the trial court's order is vacated. On remand, the trial court shall enter an order directing Surety to pay the amount of the bond as executed, less any amounts already paid.

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

STATE v. MESSER

[255 N.C. App. 812 (2017)]

STATE OF NORTH CAROLINA
v.
ANTHONY EDWARD MESSER

No. COA16-1174

Filed 3 October 2017

1. Robbery—dangerous weapon—motion to dismiss—sufficiency of evidence—corpus delicti—trustworthiness

The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where the State provided substantial independent evidence establishing the trustworthiness of the essential facts to which defendant confessed. Defendant's admission he stole $104.00 from the victim was credible, and the corpus delicti for robbery with a dangerous weapon was established.

2. Confessions and Incriminating Statements—in-custody statement—evidence from seized clothing—DNA test—sufficiency of findings of fact—criminal activity—probable cause for arrest

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motions to suppress his in-custody statement and evidence from his seized clothing and DNA test where the contested findings of fact were supported by competent evidence, were inconsequential to the holding, or did not amount to prejudicial error. The findings suggested the probability or substantial chance that defendant engaged in criminal activity and thus supported the conclusion that the detectives had probable cause to arrest defendant.

Appeal by Defendant from judgment entered 6 November 2015 and 10 November 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Paul F. Herzog, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Anthony Edward Messer ("Defendant") appeals a jury verdict convicting him of first degree murder and robbery with a dangerous weapon. On appeal, Defendant argues the following: (1) the trial court erred by denying his motion to dismiss because the State failed to establish the *corpus delicti* of the charge of robbery with a dangerous weapon; and (2) the trial court erred by denying his motions to suppress his in-custody interview by law enforcement officers, his clothing, and the results of his DNA testing. We find no error.

I. Factual and Procedural Background

On 16 December 2013, the Johnston County Sheriff's Department arrested Defendant on warrants for first degree murder and robbery with a dangerous weapon. Upon taking Defendant into custody and transporting him to the Johnston County Sheriff's Office, Detective Rodney Byrd interviewed Defendant for an official statement. During the interview, Defendant admitted the following:

> I told him to take me to Benson and uh, before we got to Benson, I told him I needed to get out and pee and when I got out, I acted like I peed, pulled a gun out of my pants, opened my door back up and shot him in the head.

In the same statement, Defendant claimed he took the gun used to kill Billy from Billy's home. Defendant then stole $104.00 from Billy's wallet, dragged Billy out of the car, and left. Defendant said he then went to "the crackman's house."

After the interview, Detectives seized the shirt Defendant wore during his arrest, because it "appeared to have mud and blood on it." Detectives then placed him into custody at the Johnston County Detention Center. On 22 January 2014, Detective Byrd obtained a warrant to seize a DNA sample from Defendant with a saliva sample.

On 15 May 2015, Defendant moved to suppress the results of his DNA test. He argued the probable cause affidavit in support of the search warrant "[wa]s insufficient." Defendant also moved to suppress the statement he made to Detective Byrd on the night of his arrest because he "was too impaired after a day of drug use and drinking to understand his Miranda rights and to knowingly and intelligently waive [the] same."

On 12 October 2015, the trial court held a suppression hearing for Defendant's motion to suppress his in-custody statement. At that time, defense counsel announced he did not plan to present evidence on his *Miranda* rights argument. Defendant shifted his argument and claimed detectives arrested him without probable cause, and, therefore, his

statement, DNA test, and clothing should be suppressed as fruits of the poisonous tree. The court allowed the amendment, and the State did not object to the lack of notice. The court denied all the motions to suppress.[1]

The Johnston County Superior Court called Defendant's case for trial on 26 October 2015. The State called eighteen witnesses in total, and the evidence tended to show the following.

The State first called Keith Burakowski, a Deputy Sheriff with the Johnston County Sheriff's Office. In response to a call on 16 December 2013, emergency communications dispatched Deputy Burakowski to the intersection of Hannah Creek Road and Strickland's Crossroads Road. Deputy Burakowski arrived at the scene at 11:49 a.m. He saw Billy lying on the side of the road, with a towel over his midsection. About eight to ten feet from Billy, he noticed a "black in color revolver with a brown handle[,]" which he later identified as a ".38 revolver." He immediately called for EMS because Billy "was . . . gasping for breath[.]" After contacting EMS, Deputy Burakowski "secured the gun[,]" by removing one discharged and five unfired rounds of ammunition from the barrel. He placed the gun and ammunition in the trunk of his patrol car. Deputy Burakowski then "secured the area" and called the dispatch center and asked them to "run" the gun's serial number.

The State next called Ricky Messer, who is not related to Defendant. Around 11:30 a.m. on 16 December 2013, Ricky drove home from a nearby rock quarry on Strickland's Crossroads Road. As he passed the intersection at Hannah Creek Road, he noticed Billy's body lying on the side of the road, with his pants around his knees. Ricky knew Billy "virtually all [his] life[.]" However, Ricky did not immediately recognize Billy, because he was lying on his side and blood covered his face and hair. Ricky also saw a denture plate and pair of glasses lying nearby.

The State then called James Dwayne Dorman.[2] On 16 December 2013 at around 11:30 a.m., James and his wife, Kim, returned home from shopping at Food Lion in Benson. James and Kim came upon Billy at the same time as Ricky. James's description of the appearance and location

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1. Defendant filed other pretrial motions, such as a motion *in limine* and a motion for mistrial. However, the only relevant motions on appeal are the motion to dismiss and the three above-mentioned motions to suppress.

2. The State actually called emergency dispatcher, Travis Johnson, who received the 911 call, before James Dorman. His testimony is not dispositive to the issues on appeal in this case.

of Billy's body on the side of Hannah Creek Road largely matched Ricky's account. He only added that his wife[3] covered Billy's midsection with a towel.

Christopher Shambaugh next testified for the State. He works for the Johnston County EMS and responded to Deputy Burakowski's call. He arrived at the scene at 11:50 a.m. He did not detect a pulse or heart beat anywhere on Billy's body and declared Billy dead around 11:57 a.m.

The State called Billy's youngest son, Robert Dale Strickland.[4] Dale lived with his father for "all [his] life[.]" Dale and Defendant were "friends," and grew up in the same neighborhood.

On the evening of 15 December 2013, Dale visited his cousin. At approximately 9:00 p.m., Defendant called Dale and asked to stay the night at his home. Defendant explained he and his father argued earlier in the evening. Dale told Defendant he was not home, but Defendant could go to his home because Billy was there. Around 9:30 p.m., Billy and Defendant picked Dale up, and they all returned to Billy's home.

Later in the evening, Defendant repeatedly asked Dale if he knew where they could find drugs. Defendant gave him some "empty bags and straws and stuff, paraphernalia, whatnot . . . . " Defendant told Dale he knew "two elder[ly] people that . . . he could get some money from . . . , but he would have to kill them to get it[,]" by "put[ting] two bullets in their head[s]." Hoping to move away from this subject, Dale discussed guns because they are his "go-to" hobby. Defendant persisted, and Dale eventually told Defendant he would try to get some drugs in the morning. The two went to sleep between 4:00 a.m. and 5:00 a.m. in the morning.

On the morning of 16 December 2013, Dale awoke around 11:00 a.m. and found the home empty. Dale looked behind the recliner in the living room, where Billy normally kept one of his guns, a black, .38 special revolver with a wooden handle. However, Dale could not find it. Dale noticed Billy's medicine bottles appeared "gone through and turned over . . . just like somebody searching for something." Dale also noticed an empty spot in Billy's used car lot adjacent to the house, where a gold Chevrolet Malibu usually sat. Dale called Billy's cellphone several times,

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3. James's wife, Kimberly Dorman, also testified on behalf of the State. Her testimony matched her husband's.

4. The State called two witnesses before Dale, Billy's elder son, Chris Strickland, and Detective Jamie Snipes, who transported Defendant to the Johnston County Sheriff's Office on the evening of 16 December 2013. Their testimony is not dispositive to the issues on appeal.

but Billy did not answer. Dale never called the police because "it was Monday and on Mondays my dad goes to the car sale every Monday, and you know, I assumed, you know, I didn't assume the worst."

Between 12:30 p.m. and 1:30 p.m., officers came to Billy's home. When Dale saw them turn into his driveway, he thought they wanted to arrest him because he "was involved in drugs[.]" He ran into the woods and called his boss, James, and asked for a ride. James picked Dale up and took Dale to his cousin's home. At some point during this interaction, Dale asked James to create a false alibi for Dale if law enforcement contacted him. During Dale's visit at his cousin's home, his uncle stopped by and told Dale Billy died that morning.

Dale returned home around 6:00 p.m., where Detective Byrd waited for him. Though he first lied to Detective Byrd regarding his whereabouts that day, he eventually conveyed to Detective Byrd the above testimony.

The State then called Detective Byrd. He works as a detective for the Johnston County Sheriff's Office and investigated Defendant's case. On 16 December 2013, he received instructions to go to the intersection of Hannah Creek Road and Strickland's Crossroads Road. He arrived at 12:48 p.m. His description of the crime scene and Billy's appearance matches that of Ricky Messer and both the Dormans. Detective Byrd noticed a wallet in Billy's back pocket, which contained Billy's I.D. and a few cards, but no cash.

That afternoon, Detective Byrd went to Billy's home with Detectives Don Pate and Kevin Massengill. They found the door ajar and did not find anyone in the home or on the property. Finding no one, Detective Byrd went to give a "death notification," to Chris Strickland and other family members. Around 6:15 p.m., Detective Byrd interviewed Dale when Dale returned home from his cousin's home.

When asked why he and other detectives "went looking for Andy Messer," Detective Byrd replied:

> Based on the phone call from Mr. Messer to Mr. Danny Stanley, in [the] interview with Mr. Strickland, the fact of the defendant Mr. Andy Messer stayed the night before, and when Mr. Strickland woke up, both Andy Messer and his father were missing, along with [sic] .38 Special, I began looking a little harder for the defendant Mr. Andy Messer.

After interviewing Dale, Detective Byrd went to Defendant's home, hoping to locate him. While there, detectives received a phone call

and drove to I-95 in Cumberland County near mile marker sixty-one. There, Detective Byrd saw another detective place Defendant in handcuffs. Detective Snipes transported Defendant to the Johnston County Sheriff's Office.

Back at the Johnston County Sheriff's Office, Detective Byrd interviewed Defendant around 8:10 p.m. At this point in the trial, the State moved to introduce a video recording of Defendant's in-custody interview into evidence. Defendant objected, preserving his motion to suppress for appeal. The trial court overruled Defendant's objection and the State played the recording for the jury.

In the recording, prior to questioning Defendant, Detective Byrd gave Defendant *Miranda* warnings, which Defendant waived. Defendant confessed to killing Billy and stealing $104.00 from Billy. At the conclusion of the interview, Detective Byrd arrested Defendant.

The State then called Dr. Lauren Scott. As the Associate Chief Medical Examiner, she performed the autopsy on Billy. She determined Billy died from "[a] gunshot wound to the head." She found two gunshot wounds, an entry wound on his right temple and an exit wound on his left temple. Billy's head also showed signs of "bleeding in between the brain and the membranes that surrounds the brain . . . bruises or contusions to the brain itself . . . [and] many fractures at the base of the skull."

The State called Detective Massengill of the Johnston County Sheriff's Office. Detective Massengill assisted the investigation for Billy's case. He helped locate the missing gold Chevy Malibu, based upon Defendant's interview with Detective Byrd. Officers found the car down a path in a wooded area in Cumberland County.[5]

The State then called Jennifer Whitley of the Johnston County Clerk's Office.[6] On 17 December 2013, Jennifer saw "a name that [she] recognized[,]" on the court's initial appearance list. Once she saw Defendant, Jennifer told a co-worker she knew Defendant's father. Defendant overheard Jennifer and spoke with her. Defendant told Jennifer "[his father]

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5. The State then called Captain Caldwell of the Johnston County Sheriff's Office. Captain Caldwell also helped locate the missing Malibu and his testimony regarding how and where detectives found the car matches Detective Massengill's. Further, after finding the vehicle, he waited until a local towing company came to transport the car back to Johnston County.

6. Ron Mazur, a Johnston County crime scene investigator testified just before Jennifer. However, his testimony consisted of generally proper evidence tagging and transporting procedures and is not dispositive to this appeal.

got [Defendant] hooked on drugs and that [his father] was able to get off and that [Defendant] wasn't, and that's why [Defendant] blew that m----f-----'s head off yesterday." Jennifer told Detective Byrd.

The State called Detective Liza Langdon, a crime scene investigator for the Johnston County Sheriff's Office. She arrived at the intersection of Hannah Creek Road and Strickland's Crossroads Road at 12:48 p.m. Detective Langdon worked closely with Detective Mazur in gathering and securing evidence at the scene of the crime. She took photographs of the scene, the .38 Smith and Wesson revolver and ammunition Detective Burakowski secured, the wallet in Billy's back pocket, the glass fragments in the road, the dentures, and the eyeglasses.

Later that evening, Detective Langdon drove to Wade, North Carolina, where other detectives found the missing Malibu. She secured the car and searched it, after receiving a search warrant. Pursuant to the search warrant, Detective Langdon collected suspected blood, a pink lighter, a cigarette butt, pieces of glass, and clothing.

On 22 January 2014, Detective Langdon took swabs of Defendant's cheek. Detective Langdon sent these cheek swabs, along with items from the autopsy, the vehicle, and from Defendant himself, to the State Crime Lab on 7 February 2014.[7]

The State called Agent Martha Traugott, a serologist at the North Carolina State Crime Laboratory. As a serologist, she "identif[ies] body fluids on cases in any sort of criminal case[,]" such as "blood, semen, or saliva." Agent Traugott analyzed the body fluids present on the evidence for Defendant's case and determined Defendant's shirt contained a blood stain.

The State next called Agent Michelle Hannon, a DNA analyst at the State Crime Laboratory. She tested the evidence against the DNA from Defendant's cheek swab. In her expert opinion, the blood on Defendant's shirt matched the DNA profile of Billy Strickland. She tested the cuttings from Billy's coat and determined those DNA profiles "[were] consistent with mixtures of at least two contributors." She could not further identify the DNA profiles due to "insufficient quality and/or quantity." Agent Hannon also tested the gun but did not obtain "a profile that was interpretable."

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7. At trial, Defendant questioned Langdon extensively regarding how she obtained, boxed, transported, and stored each item of evidence. However, that testimony is not dispositive to this appeal, as Defendant did not challenge the status of any evidence against him.

The State rested. Defendant moved to dismiss all charges. The court denied both motions. Defendant did not present any evidence and renewed his motions to dismiss. The Court denied the motions.

On 6 November 2015, the jury found Defendant guilty of robbery with a dangerous weapon and first degree murder premised upon felony murder, but not premeditation and deliberation. The court arrested judgment on the robbery with a dangerous weapon charge and sentenced Defendant to life imprisonment, without parole. Defendant gave oral notice of appeal in open court.

II. Standard of Review

Regarding the motion to dismiss, "[t]his Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

Second, our review of an order deciding a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Analysis

We review Defendant's arguments in two parts: (A) his motion to dismiss; and (B) his motions to suppress.

A. Motion to Dismiss

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon because the State failed to establish the *corpus delicti* of that crime. Specifically, Defendant contends the State relied solely on his uncorroborated

confession to law enforcement officers, which is insufficient to establish guilt. We disagree.

Corpus delicti means "the body of the crime," and typically describes "the material substance on which a crime has been committed." *Black's Law Dictionary* 419-20 (10th ed. 2014). As a modern doctrine, the *corpus delicti* rule states "no criminal conviction can be based upon defendant's extrajudicial confession or admission, although otherwise admissible, unless there is other evidence tending to establish the corpus delicti." *State v. Smith*, 362 N.C. 583, 590, 669 S.E.2d 299, 304 (2008) (citation and quotation omitted).

Various cultures adopted iterations of the *corpus delicti* doctrine for centuries to guard against the wrongful convictions of innocent defendants. *Id.* at 589, 669 S.E.2d at 303-04; Brian C. Reeve, *State v. Parker: North Carolina Adopts the Trustworthiness Doctrine*, 64 N.C. L. Rev. 1285, 1290 (1986). As early as 2250 B.C., *Hammurabi's Code of Laws* "required one accusing another of a capital offense to prove his case or else be put to death." *Smith*, 362 N.C. at 589, 669 S.E.2d at 303-04 (citing Robert Francis Harper, *The Code of Hammurabi King of Babylon about 2250 B.C.* § 1 (2d ed. 1904)).

However, the modern doctrine regarding the need to corroborate a defendant's testimony took root in the common law of England with *Perry's Case*. *Id.* at 590, 669 S.E.2d at 304. *Perry's Case* involved a defendant who confessed to a murder of a missing man and incriminated his mother and brother in the confession. *State v. Dern*, 303 Kan. 400, 401, 362 P.3d 566, 577 (2015). Although the mother and brother repeatedly denied all wrongdoing, the court convicted all three and sentenced them to death. *Id.* at 400, 362 P.3d at 577. The supposed victim turned up alive years later. *Id.* at 400, 362 P.3d at 577.

Thereafter, *corpus delicti* cemented itself into the English common law. *See Smith*, 362 N.C. at 590, 669 S.E.2d at 304-05. However, "no definitive rule emanated from the English courts," and, therefore, American jurisdictions adopted different versions of the rule. *Id.* at 590, 669 S.E.2d at 305. Almost all American states adopted some form of *corpus delicti* into their common law, and a few have codified it. *See* Reeve, *supra* at 1290-91, n. 53 (citation omitted). Only Massachusetts allows "a criminal conviction based solely on a defendant's confession without extrinsic corroboration." *Id.* at 1290, n. 49 (citations omitted).

Corpus delicti has existed in North Carolina case law since the eighteenth century. *Smith*, 362 N.C. at 592, 669 S.E.2d at 305 (citation

omitted). For almost two hundred years the rule stood, "a conviction cannot be sustained upon a naked extrajudicial confession. There must be independent proof, either direct or circumstantial, of the *corpus delicti* in order for the conviction to be sustained." *State v. Green*, 295 N.C. 244, 248, 244 S.E.2d 369, 371 (1978).

This evidentiary requirement applied to all confessions and admissions until 1985, when the North Carolina Supreme Court decided *State v. Parker*, 315 N.C. 222, 337 S.E.2d. 487 (1985). In *Parker*, our State's highest court loosened the "quantum and quality" of corroborative evidence needed to satisfy *corpus delicti*. *Smith*, 362 N.C. at 592, 669 S.E.2d at 306. The North Carolina Supreme Court adopted a version of *corpus delicti* known as "the 'trustworthiness' doctrine, which focuses on the reliability of a defendant's confession rather than independent evidence of the *corpus delicti*." Reeve, *supra*, at 1290-91; *Parker*, 315 N.C. at 236, 337 S.E.2d at 495.

Writing for a unanimous court, Justice Billings cited three reasons for loosening the traditional *corpus delicti* doctrine. First, because the doctrine imposes a strict burden of proof on the State for all crimes, "the results obtained through application of a rule requiring independent proof of the *corpus delicti* will not be consistent or comparable[.]" *Parker*, 315 N.C. at 232, 337 S.E.2d at 493. The traditional doctrine tended to place an unwarranted burden on the State in certain instances such as attempt crimes, which do not have a "tangible *corpus*[.]" *Id.* at 232, 337 S.E.2d at 493 (citation omitted). The second reason pertains to the development of "modern procedural safeguards[,]" Reeve, *supra* at 1296, that render *corpus delicti* unnecessary to alleviate "the concern that the defendant's confession might have been coerced or induced by abusive police tactics[.]" *Parker*, 315 N.C. at 234, 337 S.E.2d at 494. Concerns surrounding the validity of an extra-judicial confession "have been undercut by the principles enunciated in *Miranda v. Arizona* . . . and the development of similar doctrines relating to the voluntariness of confessions which limit the opportunity for overzealous law enforcement." *Id.* at 234, 337 S.E.2d at 494. Finally, Justice Billings opined the trustworthiness doctrine operates as a more realistic and "flexible" standard for the State when interviewing a defendant and gathering evidence against him. *Id.* at 235, 337 S.E.2d at 494 (citation omitted).

Relying on these justifications, the *Parker* Court held:

> We adopt a rule in non-capital cases that when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent

> proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

Id. at 236, 337 S.E.2d at 495. The Supreme Court emphasized, however, "when independent proof of loss is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice." *Id.* at 236, 337 S.E.2d at 495.

Parker did not wholly demolish the traditional *corpus delicti* rule, however. In 2013, the North Carolina Supreme Court clarified, "we did not abandon the traditional rule when we adopted the rule in *Parker*. Rather, the State may now satisfy the *corpus delicti* rule under the traditional formulation or under the *Parker* formulation." *State v. Cox*, 367 N.C. 147, 153, 749 S.E.2d 271, 276 (2013) (citations omitted).

In Defendant's brief, his primary argument is because he was convicted of felony murder based on the underlying felony of robbery with a dangerous weapon (rather than based on premeditation and deliberation), under the *corpus delicti* doctrine, the State was required—but failed—to introduce other evidence corroborating the assertion that he stole $104 from the victim. Defendant's argument is his motion to dismiss should be granted because there is not a scintilla of evidence that Defendant took $104 from the victim and therefore a jury would lack the substantial evidence required to support a reasonable inference of Defendant's guilt. Defendant's argument, if adopted, would require nonconfessional evidence of every element of a crime to be submitted to the jury. We are not persuaded by this argument.

Under the trustworthiness doctrine, the State does not need independent evidence of each element of the crime to show Defendant's confession to robbery with a dangerous weapon was trustworthy. Our Supreme Court in *Parker*, rejected a similar argument. The State need only show "corroborative evidence tending to establish the reliability of the confession"—not the reliability of each part of the confession which incriminates the defendant.

In *Parker*, the defendant admitted he murdered the victims and then took $10.00 from one of their pockets. *Parker*, 315 N.C. at 237, 337 S.E.2d at 495-96. The Supreme Court held this confession sufficiently trustworthy because: (1) the bodies were found by police in the condition

described by the defendant; (2) the blood found in the victim's car was consistent with both of the victims' blood; and (3) the evidence was consistent with defendant's statement as to how he disposed of the bodies. *Id.* at 237, 337 S.E.2d at 496.

Defendant's confession closely parallels that in *Parker*:

> I told him to take me to Benson and uh, before we got to Benson, I told him I needed to get out and pee and when I got out, I acted like I peed, pulled a gun out of my pants, opened my door back up and shot him in the head.
>
> . . . .
>
> Yeah, I did rob him. I got $104.00 off him.

To corroborate Defendant's testimony, the State presented the same "quantum and quantity," of evidence as it did in *Parker*. *Smith*, 362 N.C. at 592, 669 S.E.2d at 306. The following evidence aligns with Defendant's confession: (1) the medical examiner's determination Billy died from a single gunshot wound to the head; (2) the recovery of a revolver with a single expended cartridge at the scene; (3) the DNA test confirming Billy's blood was inside the 2005 Chevy Malibu; and (4) the DNA test establishing Billy's blood was on the jacket Defendant wore at the time of arrest.

Moreover, the State presented evidence to corroborate other facts. For example, Defendant confessed that he threw Billy's gun out of the car window and tossed the gun behind Billy, which aligns with Dale discovering Billy's revolver missing, and Deputy Burakowski seeing a revolver ten feet from Billy's body. Similarly, Dale reported a 2005 gold Chevy Malibu missing from Billy's used car lot, and detectives found it at a remote location matching Defendant's description of where he abandoned the gold 2005 Chevy Malibu he took from Billy's house.[8] All of Defendant's statements regarding Billy's murder, the murder weapon, and the stolen vehicle are essential facts to Billy's confession. Thus, the State provided substantial "independent evidence tending to establish" the trustworthiness of these essential facts, "including [evidence] that tend[s] to show the defendant had the opportunity to commit the crime[s,]" to which he confessed. *Parker*, 315 N.C. at 236, 337 S.E.2d at 495. Thus, we conclude Defendant's admission he stole $104.00 from

8. The State's brief contained even more evidence corroborating various facts from Defendant's confession in several ways. However, review of additional corroboration is not necessary to our holding.

Billy is credible, and the *corpus delicti* for robbery with a dangerous weapon is established.

We hold the trial court did not err in denying Defendant's motion to dismiss the charge of robbery with a dangerous weapon and overrule his assignment of error.

B. Motions to Suppress

[2] Defendant next contends the trial court erred by denying his motions to suppress his in-custody statement and evidence from his seized clothing and DNA test. Here, and at the 12 October 2015 suppression hearing, Defendant does not address his original argument regarding his inability to "knowingly and intelligently" waive his *Miranda* rights. Rather, on appeal, Defendant's argument is two-fold: (1) Findings of Fact Numbers 2, 10, and 11 are not supported by substantial evidence; and (2) detectives arrested him without probable cause, and, therefore, his statement and the evidence gathered from it are "fruits of the poisonous tree." We disagree and address Defendant's arguments in turn.

i. Finding of Fact Number 2

Defendant contends the last sentence in Finding of Fact Number 2 is not supported by substantial evidence and should be stricken from the record. We disagree.

The particular sentence to which Defendant objects states, "The patrol deputy had located a Smith and Wesson revolver *near the decedent*." (emphasis added) Defendant takes issue with the finding's description of where Deputy Burakowski found the gun at the scene. The trial court sustained Defendant's numerous objections to Detective Byrd's testimony regarding what Deputy Burakowski told him about the location of the gun at the scene. However, at one point the trial court directly questioned Deputy Burakowski about the location of the gun at the scene:

> THE COURT: Where and when was the revolver recovered and by whom?
>
> THE WITNESS: It was on the same day, 12/16/2013. It should have been a short time. Recovered by Deputy Burakowski who located the revolver on the scene of the deceased, Mr. Strickland, at which time he secured it in his vehicle. And that was -- he arrived on the scene at approximately at 11:49. Due to the EMS workers and fire personnel who arrived on the scene, he secured it in his vehicle for safety reasons.

We note Defendant did not object to this portion of testimony. From this portion of Deputy Burakowski's testimony, we conclude Finding of Fact 2 is by supported by substantial evidence. Moreover, we note even if Detective Byrd's statement does not support Finding of Fact Number 2, the portion contested by Defendant is inconsequential to our holding.

ii. Findings of Fact Numbers 10 and 11

Defendant argues Findings of Fact Numbers 10 and 11 are not supported by substantial evidence.

These Findings state:

> 10. Dale Strickland told Detective Byrd that the defendant had spent the previous night at the residence. He stated that Defendant had slept on the couch. He further stated that when he woke up, both the defendant and the victim were gone. He stated that his father's Smith and Wesson revolver also was missing and that a Malibu Chevrolet automobile was gone from his father's used car lot at the residence.
>
> 11. At about 6:30 p.m., Johnston Sheriff's Detective Kevin Massengill interviewed Carl Dean Temple, an associate of the defendant, at Temple's residence located at 736 Temple Road in Four Oaks. Temple stated that defendant had come to this residence earlier that day driving a tan colored Chevrolet Malibu automobile.

Specifically, Defendant takes issue with the portion of Finding of Fact Number 10: "Dale Strickland . . . stated that his father's Smith and Wesson revolver also was missing . . . . " Defendant points out Dale Strickland never told Detective Byrd the manufacturer of his father's firearm. We agree with Defendant.

This portion of the finding is not supported by substantial evidence. Accordingly, we strike this portion of the finding. However, we conclude this error is not prejudicial in light of the following facts: (1) Dale specified to Detective Byrd his father's ".38 revolver was missing[;]" (2) Dale specified to Detective Byrd "[h]is dad's . . . .38 special gun was gone[;]" and (3) Dale's description of his father's missing gun matched that of the gun found at the scene of Billy's body. The record shows a connection between Billy's missing gun and the gun found at the scene exists. Therefore, whether or not Dale identified the manufacturer of his father's missing gun to Detective Byrd is irrelevant to our holding.

Regarding Finding of Fact Number 11, Defendant objects to the last sentence, which states, "Temple stated that defendant had come to this residence earlier that day driving a tan colored Chevrolet Malibu automobile." Defendant notes Detective Massengill actually testified Temple did not convey the make or model of the car he saw Defendant driving. We agree the portion of the finding Defendant contests is not supported by substantial evidence.

However, we conclude the error did not prejudice Defendant because: (1) detectives knew Defendant stayed the night at Billy's house where the used cars were stored; (2) detectives knew someone removed a 2005 gold Chevy Malibu from Billy's yard; and (3) detectives knew Temple saw Defendant in a car matching the general description of the car missing from Billy's lot. Regardless of whether Temple relayed the make and model of the car Defendant drove that day, our holding remains the same. Therefore, we strike the portion of Finding of Fact Number 11, which states the make and model of the car Temple saw, but hold it is irrelevant to the trial court's conclusions of law.

iii. Conclusion of Law

We must now determine whether the remaining portions of Findings of Fact Numbers 2, 10, and 11 and the other findings support the trial court's Conclusion of Law Number 1.

The Fourth Amendment protects "against unreasonable searches and seizures . . . . " U.S. Const. amend. IV; N.C. Const. art. I, § 20. Under North Carolina law, "[a]n officer may arrest without a warrant any person who the officer has probable cause to believe . . . [h]as committed a felony . . . ." N.C. Gen. Stat. § 15A-401(b)(2)a (2016). "The existence of probable cause depends upon 'whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' " *State v. Milien*, 144 N.C .App. 335, 341, 548 S.E.2d 768, 772 (2001) (quoting *State v. Bright*, 301 N.C. 243, 255, 271 S.E.2d 368, 376 (1980) (alterations in original). "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Teate*, 180 N.C. App. 601, 606-07, 638 S.E.2d 29, 33 (2006) (citation and quotation marks omitted).

The conclusion states:

> Under the totality of circumstances believed to exist by the Johnston County Sheriff's Detectives — including the

> fact that Defendant placed a telephone call using the victim's cell phone about 20 minutes before the victim's death was reported to the Johnston County Sheriff's Office, the fact that Defendant had spent the previous night at the victim's residence, the fact that the victim's son had last seen his father with the defendant, the fact that the victim's Smith and Wesson revolver was missing that morning and a Smith and Wesson revolver was found near the victim's body, the fact that the Defendant was seen on the day of the victim's death driving an automobile matching the description of an automobile missing from the victim's used car lot, and the fact that Defendant had called Danny Stanley the day of the victim's death looking for a place to stay — probable cause existed for the detectives to seize Defendant's person and take him into custody for the murder of Billy Strickland.

The remaining findings of fact reveal Defendant spent the evening prior to Billy's death at Billy's home, and when Dale awoke the next morning, both Defendant and Billy were gone. Dale noticed Billy's revolver missing from its usual hiding place, and a Chevy Malibu was missing from Billy's used car lot. The trial court found Detectives recovered a revolver matching the description of Billy's gun at the scene.

The trial court further found Temple told detectives Defendant placed a call from Billy's cell phone about twenty minutes before law enforcement received word of Billy's body on the side of Hannah Creek Road. Temple also told detectives he saw Defendant driving a vehicle the color of the Malibu missing from Billy's lot.

These findings suggest the "probability or substantial chance" Defendant engaged in criminal activity. *Teate*, 180 N.C. App. at 606-07, 638 S.E.2d at 33 (citation omitted). Therefore, we hold the court did not err in concluding detectives had probable cause to arrest Defendant. Thus, detectives did not unconstitutionally interview Defendant, or seize his clothing and DNA, and the trial court did not err in denying his motions to suppress.

IV. Conclusion

For the reasons stated above, we find no error.

NO ERROR.

Judges DAVIS and MURPHY concur.

STATE OF NORTH CAROLINA
v.
LESTER ALAN WALKER, DEFENDANT

No. COA17-58

Filed 3 October 2017

1. Appeal and Error—notice of appeal given prior to order date—delay entering findings of fact and conclusions of law—no prejudicial error

The trial court did not err in a driving while intoxicated and reckless and careless driving case by entering an order on 31 October 2016 where the State gave its notice of appeal prior to that date. A delay in the entry of findings of fact and conclusions of law does not amount to prejudicial error.

2. Search and Seizure—motion to suppress—vehicle stop—sufficiency of findings of fact—conclusion of law—totality of circumstances—reasonable suspicion

The trial court did not err in a driving while intoxicated and reckless and careless driving case by granting defendant's motion to suppress where the pertinent findings were supported by competent evidence and supported the conclusion of law that, given the totality of circumstances, an informant's tip did not have enough indicia of credibility to create reasonable suspicion for a trooper to stop defendant's vehicle.

Appeal by the State from an order granting Defendant's Motion to Suppress, entered 31 October 2016 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Jeffrey S. Miller, for Defendant-Appellee.

MURPHY, Judge.

The State appeals from the trial court's grant of Lester Alan Walker's ("Defendant") motion to suppress. On appeal, the State contends the trial court erred by: (1) entering the 31 October 2016 order after the

State gave its notice of appeal; and (2) granting Defendant's motion to suppress. After careful review, we hold the trial court did not err by entering the 31 October 2016 order and granting the motion to suppress.

Background

On 5 July 2015, State Trooper Jonathan Cody (the "Trooper") of the North Carolina Highway Patrol was on routine patrol on U.S. 258. At approximately 5:00 p.m., dispatch notified him that a driver ("the informant") reported another driver ("the driver") for driving while intoxicated. The informant reported the driver was driving from the Hubert area towards Jacksonville, traveling at speeds of approximately 80 to 100 miles per hour, while drinking a beer. He also claimed the driver drove "very erratically," and almost ran him off the road "a few times."

While the Trooper traveled towards Jacksonville in response to the notification from dispatch, the informant flagged him down. The informant told the Trooper that the vehicle in question, although no longer visible, had just passed through the intersection on U.S. 258 heading towards Richlands. The Trooper proceeded through the intersection on U.S. 258 towards Richlands, stopping Defendant's vehicle within approximately one-tenth of a mile from the intersection. At some point, the vehicle in question was described as a "gray Ford passenger vehicle[,]"[1] however it is unclear whether the Trooper was given this description before or after he stopped Defendant. Defendant was arrested and charged with driving while impaired, and careless and reckless driving.

Prior to trial, Defendant filed a motion to suppress the evidence seized as a result of Defendant being stopped by the Trooper. On 9 June 2016, Onslow County District Court held a hearing on this motion, which claimed the evidence obtained by the stop should be suppressed because the Trooper lacked the requisite reasonable articulable suspicion to stop Defendant. The District Court denied the motion to suppress. Subsequently, Defendant was convicted of driving while intoxicated, and reckless and careless driving.

Defendant appealed to Superior Court, which held a hearing on Defendant's motion to suppress on 15 September 2016. After taking evidence and hearing arguments, the Superior Court determined the Trooper lacked the reasonable articulable suspicion required to make

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1. The spelling of gray is a grey area. *See generally* Merriam-Webster's Collegiate Dictionary (11th ed. 2004) (listing grey as a variant of gray). We note the trial court's transcript uses "gray" and order uses "grey" to describe the same color, causing some inconsistency in the spelling of "grey" in this opinion.

the stop, and granted the motion to suppress in open court. That same day, the trial court entered a written order stating the motion was allowed, and directing Defendant's counsel to prepare an order. The State gave oral notice of appeal after the trial court announced its decision, and then gave written notice of appeal on 22 September 2016, once the trial court filed its 15 September 2016 written order. The trial court entered the written order prepared by Defendant's counsel, as directed in the 15 September 2016 order, on 31 October 2016.

Analysis

The State argues that the trial court erred: (1) by entering an order on 31 October 2016; and (2) by granting Defendant's motion to suppress. We disagree.

I. Authority to Enter the 31 October 2016 Order

[1] The State maintains that our Court should base our review solely on the 15 September 2016 order, arguing the trial court lacked jurisdiction to enter the 31 October 2016 written order because the State gave its notice of appeal prior to that date. We disagree and review the 31 October 2016 order because "our appellate courts have repeatedly held that a delay in the entry of findings of fact and conclusions of law does not amount to prejudicial error." *State v. Lippard*, 152 N.C. App. 564, 571, 568 S.E.2d 657, 662 (2002) (citing *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984)).

The State relies on *State v. Grundler*, 251 N.C. 177, 11 S.E.2d 1 (1959) to support its argument that the trial court did not have jurisdiction to enter the 31 October 2016 order, contending that once the oral and written notices of appeal are given, the trial court is without further authority to make orders *affecting the merits* of the case effective immediately. *See id.* at 185, 11 S.E.2d at 7 (explaining that "when appeal entries are noted, the appeal becomes" instantly effective, and the Superior Court no longer has the authority "to make orders affecting the merits of the case"). However, *Grundler* does not control this case because the 31 October 2016 order was not a new order *affecting the merits*, but, rather, is a chronicle of the findings and conclusions decided at the hearing. The 15 September 2016 order, which reads: "J. Miller to prepare order[,]" specifically contemplates this later entry of the 31 October 2016 order, which was intended to record the findings and conclusions decided at the 15 September 2016 hearing, not to affect the merits. As such, we reject the contentions of the State and review the 31 October 2016 order.

II. Motion to Suppress

[2] The State argues that the trial court erred in granting Defendant's motion to suppress because: (1) several of the findings of fact are not supported by competent evidence; and (2) the findings of fact do not support the conclusions of law. We disagree. The findings of fact are based on competent evidence and support the conclusions of law.

A. Standard of Review

When reviewing an order granting a motion to suppress, this Court "is strictly limited to determining whether the trial judge's underlying findings of facts are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

B. Findings of Fact

The State challenges whether there was competent evidence to support the findings of fact as follows.

i) Findings of Fact 1 and 3, Conclusion of Law 6

The State contests: (1) the part of finding of fact 1 that states "[a]t what point the radio dispatcher forwarded the information about the description of the vehicle and the license plate number is unclear from the testimony[;]" (2) the part of finding of fact 3 that states "the State offered no evidence that [the Trooper] received any information as to the tag number of the vehicle in question until after [the Trooper] stopped [Defendant's] vehicle[;]" and (3) the part of conclusion of law 6[2] that states "the State has failed to produce evidence that [the Trooper] had the license plate of [D]efendant's vehicle before making a stop in this case[.]" The State argues these findings of fact are unsupported by competent evidence because the Trooper testified he received the license plate number from dispatch before making the stop and the trial court found the Trooper credible. We disagree.

The Trooper gave conflicting testimony as to whether or not he had the license plate number at the time of the stop. According to finding of

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2. We review the portion of this conclusion of law quoted here while reviewing the findings of fact both: (1) to address the State's argument; and (2) because it describes a finding of fact, not a conclusion of law. *See Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 380, 756 S.E.2d 788, 794 (2014) ("As with separate findings of fact and conclusions of law, the factual elements of a mixed finding must be supported by competent evidence, and the legal elements must, in turn, be supported by the facts.") (citation omitted).

fact 6, which is unchallenged, the Trooper testified in District Court that he did not remember whether he had the license plate number, and then called communications the day before his 15 September 2016 Superior Court testimony to check and confirm whether "that information was relayed out." During his testimony in Superior Court, the Trooper again testified that he did not recall if he "remembered the full tag or not, at the time" of the stop, and further stated that he only recorded the tag number "on the citation, after the fact." The fact that the trial court observed in open court that the witness was credible does not bind its findings of fact as it relates to the witness's recollection of past events. This testimony provides competent evidence to support the findings related to when the radio dispatcher forwarded the information about Defendant's license plate number.

ii) Findings of Fact 4 and 7

The State next contests: the part of finding of fact 4 that states "[a]t some point the vehicle was described as a grey Ford passenger vehicle, but the State offered no evidence as to when the vehicle was so described[;]" and the part of finding of fact 7 that states "the only mention of the color of the vehicle was in the witness statements, . . . written after [Defendant's] vehicle was stopped." The State argues these findings of fact are unsupported by competent evidence because the Trooper testified that the informant told him the vehicle was a grey Ford passenger vehicle when she flagged him down, and he may have had the information that the car was grey before he stopped Defendant. We disagree.

During his testimony, the Trooper admitted that he only knew the color of the vehicle from the witness statements. Further, the Trooper admitted that the witness statements were written after the stop, and he "may or may not" have had the information prior to the stop. Overall, the Trooper was unclear as to what description of the vehicle he had at the time of the stop. At first, during direct examination, he claimed to have been looking for a Ford Taurus. When opposing counsel took issue with this description, the Trooper changed his testimony to say he only had information that the vehicle was a "gray Ford passenger vehicle." This conflicting testimony presents competent evidence that the State failed to show when and to what extent the Trooper was aware of the description of the vehicle.

iii) Finding of Fact 13

The State next challenges whether there was competent evidence to support finding of fact 13 that, at the time of the stop, the Trooper had no particular information as to what vehicle he was looking for except

that it was a grey Ford. The State argues the Trooper did have particular information as to what vehicle he was looking for, claiming he knew the model and the license plate number of the vehicle. As discussed above, the Trooper gave conflicting testimony both as to whether or not he had the license plate number at the time of the stop, and as to whether he knew the model of the car. As there was competent evidence supporting the trial court's findings of fact 1, 3, 4, and 7, there is also competent evidence to support finding of fact 13 that there was no particular information about the vehicle except that it was a grey Ford.

C. Conclusions of Law

The State argues that the findings of fact do not support the conclusions of law. We disagree.[3]

The State challenges the following conclusions of law:

> 1. At the time that [the Trooper] stopped [Defendant's] vehicle he lacked any reasonable, articulable suspicion that [Defendant] was engaged in any unlawful activity, since he lacked any information that particularized [Defendant's] vehicle as the one that had been complained about in Hubert earlier that day or complained about by the roadside witnesses.
>
> 2. The State has advanced *State v. Maready*, 362 N.C. 614 (2008), as authority for its position that [the Trooper's] stop of [Defendant] was lawful. Upon the court's review of *State v. Maready*, it is obvious that prior to the stop the deputies saw the defendant staggering, obviously intoxicated, across the roadway, and a driver behind Maready's vehicle told them that Maready had been driving erratically, running stop signs and stop lights. Furthermore, he specifically pointed out the vehicle as being the suspected vehicle.
>
> 3. In this case noone [sic] specifically pointed out [Defendant's] vehicle as being the one that was reported as having been observed or reported driving unlawfully. Furthermore, unlike the case in *Maready*, the State

3. We note that in reviewing these conclusions of law for whether the order's findings of fact support the conclusions, we are bound by the order's findings of fact because, as discussed above, they are supported by competent evidence. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619 (explaining that when "the trial judge's underlying findings of facts are supported by competent evidence, . . . they are conclusively binding on appeal").

Trooper here did not observe the driver do anything, nor did he observe the vehicle being driven in any erratic or any other suspicious way.

4. The State further relied upon *State v. Nelson*, No. COA13-1355 (unpublished 2014), but that case is distinguishable from this one because the tipster in question "flagged [the officer] down and directed his attention to the pickup truck, which was exciting [sic] the parking lot." In that case then the suspected vehicle was specifically identified. Here the evidence was that [Defendant's] vehicle was never specifically pointed out to the Trooper prior to him making the stop.

5. In *State v. Hudgins*, 195 N.C. App. 430 (2009) there again was no question at the time of the stop that the vehicle stopped was the vehicle that had been complained about. The officer in question had advised the dispatch to direct the caller to drive to Market Street so he could intercept them. Officer Pamenteri proceeded to Market Street where he observed vehicles matching the description given by the caller stopped at a red light. There was in that case no question as to the particular vehicle or person to be seized.

6. In *Navarette v. California*, 134 S.Ct. 1683 (2014), the officer making the stop had the license plate number of the pickup truck before he made the stop of the vehicle. Here the State has failed to produce evidence that [the Trooper] had the license plate of [D]efendant's vehicle before making a stop in this case, and the court further notes and finds as a fact that [the Trooper], while he testified that he found a vehicle that matched that tag number, admitted that in the trial in District Court he did not remember that dispatch had given out a tag or a description of the vehicle "from our communications" and that he had called his communications the day before the hearing and learned that that information was relayed out. "It was just from my memory from District Court that I didn't remember that that happened."

7. Based upon the totality of the circumstances the court concludes that the State failed to carry its burden of demonstrating that [the Trooper] was looking for any

> vehicle that was "particularly described" as the Fourth Amendment and the cases thereunder require, and that the stop of [D]efendant's vehicle and the fruits thereof must be suppressed.

The State contends the trial court's conclusions of law are in error because of the conclusion that the Trooper lacked reasonable suspicion to stop Defendant. Specifically, the State argues the conclusions cannot be supported on the ground that the informant's tip was not sufficiently reliable. We disagree, because the tip did not have sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop of the vehicle driven by Defendant.

"[T]o conduct an investigatory warrantless stop and detention of an individual, a police officer must have reasonable suspicion, grounded in articulable and objective facts, that the individual is engaged in criminal activity." *State v. Hudgins*, 195 N.C. App. 430, 433, 672 S.E.2d 717, 719 (2009) (citation omitted). "[I]n determining whether a reasonable suspicion exists[,]" we consider the totality of these circumstances, *id.* at 720, 672 S.E.2d at 720 (quotation omitted), including "the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (quotation and citations omitted). We do not consider information that he later learns; "reasonable suspicion must arise from the officer's knowledge prior to the time of the stop." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"When police act on the basis of an informant's tip, the indicia of the tip's reliability are certainly among the circumstances that must be considered in determining whether reasonable suspicion exists." *State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008). Potential indicia include "all the facts known to the officers from personal observation[.]" *Id.* at 619, 669 S.E.2d at 567 (quotation omitted). In *Maready*, the officers observed an intoxicated man enter a vehicle. A nearby second vehicle's driver, who had also been in a position to see the intoxicated man enter the first vehicle, then approached the officers and, while able to point out the first vehicle, told the officers that the first vehicle had been driving erratically, running stop signs and stop lights. *Id.* at 620, 669 S.E.2d at 568.

Here, the informant's tip has less indicia of credibility than the tip in *Maready*. While the informant was not anonymous, he was unable to specifically point out Defendant's vehicle as being the one driving unlawfully, as it was out of sight, and the Trooper did not observe Defendant's

vehicle being driven in a suspicious or erratic fashion. Moreover, as addressed in the findings of fact, it is unknown whether the Trooper had the license plate number before or after the stop, and, further, we do not know whether he had any vehicle description besides a "gray Ford passenger vehicle" to specify his search.

The State also challenges the conclusions of law that distinguish *State v. Hudgins*, 195 N.C. App. 430, 672 S.E.2d 717 (2009) and *State v. Nelson*, No. COA13-1355, 235 N.C. App. 219, 763 S.E.2d 339, 2014 WL 3510586 (N.C. Ct. App. July 15, 2014) (unpublished) from the instant case. Similar to *Maready*, in both *Hudgins* and *Nelson*, the officers had reasonable suspicion to stop an individual where an informant's tip had sufficient indicia of reliability to, in light of the totality of the circumstances, create reasonable suspicion. In *Hudgins* and *Nelson*, the tip provided enough information that there was no doubt as to which particular vehicle each informant reported. *Hudgins*, 195 N.C. App. at 431, 672 S.E.2d at 718; *Nelson*, 2014 WL 3510586 *7. In contrast, here, the informant's ambiguous description did not specify a particular vehicle. There were no other circumstances that enabled the Trooper to further corroborate the tip; the Trooper did not testify that he witnessed Defendant's vehicle exhibit any behavior similar to the erratic driving described by the informant. Thus, given the totality of the circumstances, this informant's tip did not have enough indicia of credibility to create reasonable suspicion for the Trooper to stop Defendant's vehicle.

Conclusion

For the foregoing reasons, we hold that the trial court had jurisdiction to enter the 31 October 2016 order. The findings of fact in that order were based on competent evidence, and support the conclusions of law.

AFFIRMED

Judges HUNTER, JR. and DAVIS concur.

SWAN BEACH COROLLA, L.L.C. v. CTY. OF CURRITUCK

[255 N.C. App. 837 (2017)]

SWAN BEACH COROLLA, L.L.C., OCEAN ASSOCIATES, LP, LITTLE NECK TOWERS, L.L.C., GERALD FRIEDMAN, NANCY FRIEDMAN, CHARLES S. FRIEDMAN, 'TIL MORNING, LLC, AND SECOND STAR, LLC, PLAINTIFFS

v.

COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; AND JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY, J. OWEN ETHERIDGE, PAUL MARTIN, AND S. PAUL O'NEAL AS MEMBERS OF THE CURRITUCK COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA16-804

Filed 3 October 2017

1. Judgments—default—remand from appeal—time for answer—motion to set aside—good cause

The trial court abused its discretion by not applying the proper standard (good cause) in denying a motion to set aside an entry of default, which came after the case had been remanded by an appellate court. The trial court identified no reason for the denial of the motion other than uncertainty as to whether the time for filing an answer had run. Any doubt should be resolved in favor of setting aside an entry of default.

2. Judgments—default—remand after appeal—motion to set aside entry of default—denied—grave injustice

In a case decided on other grounds, the trial court would have abused its discretion by denying defendants' motion to set aside an entry of default following remand where defendants would have suffered a grave injustice were they denied the ability to defend against plaintiffs' claims. The case was delayed in the trial court for reasons inherent in the appellate process; defendants promptly resumed discussions with plaintiff regarding discovery, settlement, and other related matters following the appellate decision; the entry of default came as a surprise to defendants; nothing in the record indicated that plaintiffs asserted that they had asserted any harm; and, given the size and nature of the claims, defendants would suffer a grave harm if they were denied the ability to defend against plaintiffs' claims.

Judge BERGER dissenting.

Appeal by Defendants from a default judgment entered 9 May 2016 by Judge Milton F. Fitch, Jr., in Currituck County Superior Court. Heard in the Court of Appeals 19 April 2017.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster and Lacy H. Reaves, for Plaintiffs-Appellees.

The Brough Law Firm, PLLC, by G. Nicholas Herman and Currituck County Attorney Donald I. McRee, Jr., for Defendants-Appellants.

Conner Gwyn Schenck PLLC, by James S. Schenck, IV, and Amy Bason, for Amicus Curiae, the North Carolina Association of County Commissioners.

Simonsen Law Firm, P.C., by Lars P. Simonsen, for Amicus Curiae, the Northern Currituck Outer Banks Association.

Roger W. Knight, P.A., by Roger W. Knight, for Amicus Curiae, the Fruitville Beach Civic Association.

INMAN, Judge.

The County of Currituck, the Currituck County Board of Commissioners, and members of that Board (collectively, "Defendants") appeal from the trial court's denial of their motion to set aside entry of default and the trial court's grant of default judgment in favor of Swan Beach Corolla, L.L.C., Ocean Associates, LP, Little Neck Towers, L.L.C., Gerald Friedman, Nancy Friedman, Charles S. Friedman, 'til Morning, LLC, and Second Star, LLC (collectively, "Plaintiffs"). Defendants argue that the trial court erred because the time in which they had to file an answer never commenced, thereby making the clerk's entry of default premature and void. Defendants also argue that even if they did not timely file an answer, the trial court abused its discretion by failing to apply the good cause standard when considering Defendants' motion to set aside the entry of default.

After careful review, we reverse the trial court's denial of Defendants' motion to set aside the entry of default.

Factual and Procedural History

This is the third appeal to this Court in this case. Facts relevant to this appeal follow, but additional procedural and factual history of the litigation are included in our decisions resulting from the first two appeals. *See Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, 234 N.C. App. 617, 619-21, 760 S.E.2d 302, 305-07 (2014) (*Swan Beach I*); *and Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, No. COA15-293,

2015 WL 8747777 *1, *1-3 (N.C. Ct. App. Dec. 15, 2015) (unpublished) (*Swan Beach II*).

Plaintiffs, a group of owners of real property in Currituck County, filed suit after Defendants refused to allow Plaintiffs to develop their land. Plaintiffs alleged in their complaint that: (1) Plaintiffs have common law vested rights to develop their property (the "Vested Rights Claim"); (2) Defendants were violating Plaintiffs' rights to due process and equal protection under the federal Constitution (the "Equal Protection Claim"); and (3) Defendants were violating Plaintiffs' right to taxation by uniform rules as guaranteed by Article V, Section 2 of the North Carolina Constitution (the "Uniform Tax Claim").

Defendants moved to dismiss all three claims pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure without filing an answer. The trial court entered an order granting the motion in July 2013. Plaintiffs appealed, which resulted in the first appeal to this Court and our opinion in *Swan Beach I*.

Swan Beach I was decided by this Court on 1 July 2014. In *Swan Beach I*, we affirmed the trial court's dismissal of the Uniform Tax Claim, but reversed the dismissal of the Vested Rights Claim and the Equal Protection Claim. 234 N.C. App. at 622-31, 760 S.E.2d at 307-13. We remanded the matter to the trial court for further proceedings on the two remaining claims. *Id.* at 631, 760 S.E.2d at 313.

Less than a week after our decision, counsel for Defendants contacted counsel for Plaintiffs via email to disclose documents that could be subject to discovery and to forecast a forthcoming analysis by the county planning director to address Plaintiffs' long frustrated development plans.

On 21 July 2014, the mandate on *Swan Beach I* issued.

On 18 August 2014, counsel for Plaintiffs proposed via email to counsel for Defendants a meeting on 25 August 2014 to discuss settlement of the litigation. Defendants' counsel responded the following day, agreed to the meeting, and indicated that a location had been secured for depositions related to the litigation.

On 21 August 2014, thirty days after the issuance of the mandate and four days before the scheduled meeting to discuss settlement, Plaintiffs' counsel filed with the clerk of court a motion for entry of default based on Defendants' failure to file a timely responsive pleading as to their Vested Rights and Equal Protection claims. The clerk entered default. Plaintiffs' counsel served Defendants' counsel with notice via regular mail.

Six days after the clerk entered default, on 27 August 2014, Defendants filed a motion to set aside the entry of default and submitted to the court, but were not allowed to file, a proposed answer. Defendants' motion asserted that there was "no clearly established rule under the North Carolina Rules of Appellate Procedure or North Carolina Rules of Civil Procedure setting forth the time in which responsive pleadings are to be filed following issuance of an opinion by the North Carolina Court of Appeals." Before the trial court, Defendants argued that N.C. Gen. Stat. § 1-298 (2015)—which states that "at the first session of the superior or district court after a certificate of the determination of an appeal is received, . . . if the judgment is modified, shall direct its modification and performance"—applied to the mandate from our decision in *Swan Beach I* and that Defendants' answer was not late because the trial court never entered an order directing the modification and performance, *i.e.*, the reinstatement of the Vested Rights and Equal Protection claims. The trial court denied Defendants' motion and Defendants timely appealed, leading to this Court's decision in *Swan Beach II*.

In *Swan Beach II*, we held that Defendants' appeal from the denial of their motion to set aside the entry of default was interlocutory because no default judgment had been entered. *Swan Beach II*, 2015 WL 8747777, at *2. We limited our review to Defendants' arguments regarding the defenses of governmental immunity and collateral estoppel, which affected substantial rights. *Id.* at *2. We affirmed the trial court's order only on the merits of these arguments, and otherwise "dismiss[ed] Defendants' appeal without prejudice to any right Defendants may have to make [additional] arguments at some later stage." *Id.* at *5.

Plaintiffs filed an amended motion for default judgment, and Defendants responded with a second motion to set aside the entry of default and a motion to deny Plaintiffs' motion for default judgment. The motions were heard before the trial court, which entered a default judgment awarding Plaintiffs their common law vested rights and $39,137,805 in damages for their Equal Protection claim. Defendants appealed the default judgment—the case now before us, *Swan Beach III*—and filed a motion under Rule 60(b) of the North Carolina Rules of Civil Procedure to set aside the default judgment.

This Court stayed Defendants' appeal in *Swan Beach III* until the trial court ruled on the Rule 60(b) motion. The trial court has since denied the motion and Defendants subsequently filed an appeal from that denial resulting in yet a fourth appeal, *Swan Beach IV*, which has been placed on a future docket of this Court.

In this decision, we address only Defendants' appeal from the denial of their motion to set aside the entry of default and the trial court's entry of default judgment in favor of Plaintiffs.

Analysis

Defendants' primary argument is that the time period in which they could file a responsive pleading never commenced because the complaint revived by this Court's decision in *Swan Beach I* was governed by N.C. Gen. Stat. § 1-298, which requires the trial court to enter an order effectuating the modification of its prior order following a decision by our Court. Defendants also argue that regardless of the applicability of § 1-298, the trial court abused its discretion by: (1) failing to apply the proper standard—good cause—to its determination of Defendants' motion to set aside; and (2) assuming *arguendo* that the trial court had applied the good cause standard, it abused its discretion because Defendants' actions were not dilatory, Plaintiffs were not harmed by the delay, and a failure to set aside the entry of default will result in a grave injustice to Defendants.

We hold that the trial court abused its discretion by failing to apply the proper standard in considering Defendants' motion to set aside the entry of default, and that even if the trial court had applied the proper standard, denial of Defendants' motion to set aside the entry of default would amount to an abuse of discretion. Because we hold the trial court abused its discretion in denying the motion to set aside the entry of default, the default judgment is rendered void and we do not reach Defendants' other arguments.

I. Standard of Review

The decision of whether to set aside an entry of default for good cause under Rule 55(d) of the North Carolina Rules of Civil Procedure is "within the sound discretion of the trial court[.]" *Auto. Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896 (1987) (citation omitted). Such a decision therefore will "not be disturbed on appeal absent a showing of abuse of that discretion." *Id.* at 608, 361 S.E.2d at 896 (internal quotation marks and citation omitted).

II. Motion to Set Aside the Entry of Default

[1] In determining whether a party has made a showing of good cause to set aside the entry of default, as well as when reviewing a trial court's decision regarding such a motion, our Court considers: "(1) was [the moving party] diligent in pursuit of [the] matter; (2) did [the non-moving party] suffer any harm by virtue of the delay; and (3) would

[the moving party] suffer a grave injustice by being unable to defend the action." *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009) (quoting *Auto. Equip. Distribs.*, 87 N.C. App. at 608, 361 S.E.2d at 896-97); *see also Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000). Importantly, our Court has explained that a "[d]efault judgment is a drastic remedy which should be reserved for those cases . . . in which one party refuses or fails to attend to his or her legal business." *Beard v. Pembaur*, 68 N.C. App. 52, 58, 313 S.E.2d 853, 856 (1984).

A trial court abuses its discretion when the party appealing the denial of its motion to set aside the entry of default demonstrates that the trial court did not apply the proper "good cause" standard in its determination. *Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 187 N.C. App. 658, 661-62, 654 S.E.2d 495, 498-99 (2007). In such instances, our Court has vacated and remanded the trial court's decision with instruction to the trial court to engage in a proper examination under the correct standard. *Id.* at 662, 654 S.E.2d at 499 ("The order denying the motion to set aside the entry of default must be vacated, and this matter remanded for reconsideration by the trial court as to whether [the] defendants have shown good cause to set aside default.").

However, a trial court's failure to apply the "good cause" standard is not the only circumstance in which our Court has found an abuse of discretion in denying a motion to set aside the entry of default. In *Peebles v. Moore*, 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980), *modified and aff'd* by 302 N.C. 351, 275 S.E.2d 833 (1981), this Court held that the trial court abused its discretion in finding that the defendant had not established good cause to set aside the entry of default. This Court explained that "[w]hile setting aside a default judgment under [N.C. Gen. Stat. §] 1A-1, Rule 60(b) generally involves a showing of excusable neglect and a meritorious defense, to set aside an entry of default, all that need be shown is good cause." *Id.* at 504, 269 S.E.2d at 698 (internal citations omitted). We noted that "[w]hat constitutes 'good cause' depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause, particularly 'where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant.' " *Id.* at 504, 269 S.E.2d at 698 (quoting *Whaley v. Rhodes*, 10 N.C. App. 109, 112, 177 S.E.2d 735, 737 (1970)). "This standard is less stringent than the showing of 'mistake, inadvertence, or excusable neglect' necessary to set aside a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)." *Brown*, 136 N.C. App. at 382, 524 S.E.2d at 589 (citation omitted).

In modifying and affirming our Court's decision in *Peebles*, the Supreme Court held that "the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise." *Peebles*, 302 N.C. at 356, 275 S.E.2d at 836. This principle is in line with the strong public policy that "[t]he law generally disfavors default and 'any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits.' " *Auto. Equip. Distribs.*, 87 N.C. App. at 608, 361 S.E.2d at 896 (quoting *Peebles*, 302 N.C. App. at 504-05, 269 S.E.2d at 698).

In this case, the trial court provided the following reasoning when it denied Defendants' motion to set aside the entry of default:

> THE COURT: I will readily admit that I do not fully understand the—and know the appellate rules. But would you not have an opportunity if I were to deny your Motion to Set Aside the Default to appeal that ruling?
>
> . . .
>
> THE COURT: Well, I'm going to do that. *For one reason, it will give us on the trial bench some clarity as to how we are to proceed in this particular situation where it never happens again.* So I'm going to deny your Motion to Set Aside the default. And you can appeal my ruling and then the Court of Appeals can give us some clarity on how we are to proceed on that.

(emphasis added). Plaintiffs assert that the trial court's use of the language "[f]or one reason" indicates that the trial court's uncertainty regarding § 1-298 was not the sole reason for its determination and that we must presume the court found on proper evidence facts to support its judgment—specifically, a finding of no good cause. We are unpersuaded.

A full review of the hearing and the trial court's written order reveals that the trial court identified no reason for its denial of Defendants' motion other than uncertainty as to whether the time for which Defendants had to file an answer had run. Following the governing principle that "any doubt should be resolved in favor of setting aside an entry of default," *Peebles*, 302 N.C. App. at 504-05, 269 S.E.2d at 698, we conclude that the trial court failed to apply the proper standard in its determination and abused its discretion through this failure.

[2] In addition to abusing its discretion by failing to apply the proper standard, we are persuaded that had the trial court applied the good

cause standard, it would have nonetheless abused its discretion by denying Defendants' motion given the circumstances in this case. *See Beard*, 68 N.C. App. at 56, 313 S.E.2d at 855 ("Even if the trial court used as its standard, 'good cause,' as set forth in Rule 55(d), the trial court abused its discretion in this case.").

To demonstrate good cause, Defendants must show: (1) they were diligent in pursuit of the matter; (2) Plaintiffs did not suffer harm by virtue of the delay; and (3) they would suffer a grave injustice by being unable to defend the action. *See Luke*, 194 N.C. App. at 748, 670 S.E.2d at 589.

To this end, Defendants assert on appeal that: (1) there had been extensive discovery and litigation before the trial court and our Court and Defendants' reliance on § 1-298 was neither unreasonable nor dilatory; (2) Plaintiffs have not suffered any harm by Defendants' delay in filing an answer; and (3) Defendants will suffer a grave injustice by being unable to defend against claims of religious discrimination and claims impairing Defendants' ability to govern and regulate the development of property within the County. We agree.

In *Beard*, the evidence on record indicated that "discovery was being pursued vigorously by the parties; that [the] plaintiff's counsel thought, albeit erroneously, that service was not perfected on [the] defendant until . . . four days before the entry of default; and that all matters in [the] defendant's Counterclaim related to the . . . subject of all material allegations in the plaintiff's Complaint." 68 N.C. App. at 56, 313 S.E.2d at 855-56. Based on those facts as considered in light of the principle that default judgments should be reserved for instances in which "one party refuse or fails to attend to his or her legal business[,]" this Court held that the trial court abused its discretion by denying the a motion to set aside the entry of default. *Id.* at 58, 313 S.E.2d at 856.

Plaintiffs seek to distinguish the facts of this case from those in *Beard*. Plaintiffs rely on our Court's decision in *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 487, 586 S.E.2d 791, 794 (2003), which upheld the denial of a motion to set aside the entry of default by a defendant who failed to respond for seven months after service of a summons. The defendant sought to be excused for the delay because he was not a lawyer. *Id.* at 487, 586 S.E.2d at 794. His argument was unsuccessful because "the evidence show[ed the] defendant simply neglected the matter at issue." *Id.* at 488, 586 S.E.2d at 795. *Granville* is inapposite to the present case, in which Defendants submitted an answer for filing within days of learning of the entry of default.

By the time of the hearing on the initial motion to set aside the entry of default, this case had been pending for over two years, largely for reasons inherent in any case from which an appeal is taken. Defendants had obtained a judgment of dismissal in July 2013 and followed the appeal of that judgment by Plaintiffs through litigation before this Court. The appeal was not resolved until a year later, in July 2014, when this Court reversed the dismissal of Plaintiffs' Vested Rights and Equal Protection claims.

Within a week of this Court's decision, counsel for Defendants promptly resumed discussions with Plaintiffs' counsel regarding discovery scheduling and other tasks related to continuing the litigation in the trial court. Two days before Plaintiffs' counsel sought entry of default, counsel had scheduled a meeting to discuss settlement. It is undisputed that the entry of default came as a surprise to Defendants.

Six days after the clerk's entry of default and before the entry of a default judgment, Defendants submitted a proposed answer and filed the motion to set aside the entry of default. The motion included the colorable argument that N.C. Gen. Stat. § 1-298 applied to the decision from our Court reinstating two of Plaintiffs' claims. Regardless of whether N.C. Gen. Stat. § 1-298 applied, these actions demonstrate that Defendants' delay in filing an answer was not dilatory.

Our dissenting colleague asserts that Plaintiffs were harmed by Defendants' delayed response to the complaint, advancing an argument not raised by Plaintiffs before the trial court or before this Court. Nothing in the record indicates that Plaintiffs asserted that they had suffered any harm by the delay of sixteen days between 11 August 2014, which Plaintiffs contend was the last day Defendants were allowed to file an answer, and 27 August 2014, when Defendants submitted their proposed answer. Nor have Plaintiffs in their briefs filed with this Court asserted any harm by that delay.

Finally, we are persuaded that given the size of the judgment and the nature of the claims, Defendants would suffer a grave injustice if they were denied the ability to defend against Plaintiffs' claims.

Accordingly, we hold that the trial court abused its discretion in denying Defendants' motion to set aside the entry of default.

Conclusion

For the foregoing reasons, we hold the trial court abused its discretion by failing to apply the good cause standard when it denied Defendants' motion to set aside the entry of default. Because we also hold that even if the trial court had applied the proper standard it would

have abused its discretion in denying Defendants' motion, we reverse the trial court's order.

We are not blind to the principle that "rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity." *Howell v. Haliburton*, 22 N.C. App. 40, 42, 205 S.E.2d 617, 619 (1974). But in the circumstances of this case, justice is best served by reversing the trial court's denial of Defendants' motion to set aside the clerk's entry of default.

REVERSED.

Judge ELMORE concurs.

Judge BERGER dissents with separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent from the majority opinion for two reasons: (1) it would be more prudent to remand this matter to the trial court for additional findings, and (2) the majority is sanctioning what is essentially a "mistake of law" defense by Defendants.

There is no dispute that the trial court's order is lacking. However, remanding for additional findings is appropriate in this matter. *See Coastal Fed. Credit Union v. Falls*, 217 N.C. App 100, 718 S.E.2d 192 (2011).

In addition, we should not allow mistake of law on the part of a defaulting party to constitute good cause. To demonstrate good cause, Defendants have the burden of showing: (1) Defendants were diligent in pursuit of the matter; (2) Plaintiffs did not suffer harm by virtue of the delay; and (3) Defendants would suffer "grave injustice by being unable to defend the action." *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009) (citations and quotation marks omitted).

However, our courts have held that failure to understand the law is not good cause to set aside entry of default. *See Lewis v. Hope*, 224 N.C. App. 322, 324-25, 736 S.E.2d 214, 216-17 (2012) (finding good cause was not shown where the "[d]efendant's claims amount[ed] to nothing more than alleging that he was unaware of the need to file an answer because of his unfamiliarity with the law"). *See also First Citizens Bank & Tr. Co. v. Cannon*, 138 N.C. App. 153, 158, 530 S.E.2d 581, 584

(2000) (affirming entry of default where *pro se* party claimed she " 'was unaware that she was required to file an Answer' "); *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 487, 586 S.E.2d 791, 794 (2003) (finding no good cause was shown by the defendant who argued he was "unfamiliar with the procedural and substantive rules of law").

While the law may disfavor default, courts have stressed the importance of filing timely responsive pleadings. Inattention and disregard for the rules should not be rewarded. Defendants admit they failed to file a responsive pleading. Further, they acknowledge that they were aware of this Court's determination that further proceedings were to occur, but argue that because of their interpretation of North Carolina General Statute Section 1-298, no responsive pleading was due and entry of default was improper. If mistake of law is not a valid excuse for *pro se* defendants, it should not be allowed here.

North Carolina General Statute Section 1-298 states in relevant part that "[i]n civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, . . . if the judgment is modified, [the court below] shall direct its modification and performance." N.C.G.S. § 1-298 (2015). Under the rules of civil procedure, parties have twenty days to file a response after receiving "*notice* of the court's action in ruling on [a] motion." N.C. R. Civ. P. 12(a)(1) (emphasis added). Rather than following the rules of procedure, Defendants argue that Section 1-298 requires the lower court to enter its own order to establish the efficacy of this Court's decision in *Swan Beach I* in order to continue with these proceedings. I disagree.

As noted in *D & W, Inc., v. City of Charlotte*, 268 N.C. 720, 724, 152 S.E.2d 199, 203 (1966), the Supreme Court explicitly stated "the efficacy of our mandate does not depend upon the entry of an order by the court below." The Supreme Court also highlighted that "[n]o judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended[.]" *Id.* at 722, 152 S.E.2d at 202 (citation and quotation marks omitted). A mandate from the appellate court is automatically issued twenty days after the filing of an appellate opinion. N.C.R. App. P. 32.

Defendants would have us believe that the trial court must take some affirmative act before they had the responsibility to file an answer to a complaint which they knew existed. In reality, they had twenty days in which to file a response because no action by the trial court was necessary.

Simply, the Defendants unjustifiably relied on Section 1-298 to their detriment. While the majority indicates that "Defendants submitted an answer for filing within days of learning of the entry of default," this does not make them diligent. To the contrary, Defendants had fifty days after this Court's published *Swan I* opinion to prepare and file an answer. They failed to do so, and have failed to show good cause.

Also, it is somewhat misleading to indicate that Plaintiffs have asserted no harm from the delay caused by failure to file a responsive pleading. Defendants argue *inter alia* that Plaintiffs have not raised the issue of harm, thus they are unconcerned with the delay caused by Defendants. Plaintiffs have been harmed, however, and absent the entry of default, Plaintiffs may still be waiting on Defendants to file their answer.

This litigation began in 2012. For the past five years Plaintiffs have been unable to exercise fundamental property rights due to the actions of Defendants. Plaintiffs provided affidavits from two experts attesting to the damages incurred by Plaintiffs since the beginning of this litigation. While these reports are not specific to the fifty days in which Defendants failed to respond, they are indicative of damages Plaintiffs have suffered. However, Defendants failed to address either affidavit included in the record regarding damages. Defendants have not adequately shown that Plaintiffs suffered no harm sufficient to set aside the entry of default.

I believe this matter should be remanded to the trial court for entry of additional findings. Failing there, however, Defendants were not diligent in pursuing this matter. Further, Defendants have not shown Plaintiffs have suffered no harm. Accordingly, I would affirm the entry of default.

WATAUGA COUNTY, PLAINTIFF
v.
TERESA BEAL, DEFENDANT

No. COA16-1226

Filed 3 October 2017

Process and Service—service by publication—personal delivery and certified mail not effective—prior experience

The trial court did not abuse its discretion by denying defendant's motion to set aside an entry of default and a subsequent foreclosure for failure to pay taxes where defendant contended that service by publication was made before a diligent effort to locate and serve defendant personally. Plaintiff knew from extensive prior experience that it could not make service on defendant by personal delivery or by personal or certified mail.

Appeal by defendant from order entered 26 July 2016 by Judge Hal G. Harrison in Watauga County District Court. Heard in the Court of Appeals 8 August 2017.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Chelsea Bell Garrett, for plaintiff-appellee.

Deal, Moseley & Smith, LLP, by Bryan P. Martin, for defendant-appellant.

BRYANT, Judge.

Where the unique facts of this case show that plaintiff was aware based on extensive prior experience with defendant that it could not effect service of process on defendant by personal delivery or by registered or certified mail, plaintiff's actions satisfied the "due diligence" requirement necessary to justify the use of service of process by publication, and the trial court did not err or abuse its discretion in denying defendant's motion to set aside entry of default, default judgment, foreclosure sale, and commissioner's deed. We affirm.

In November 2001, defendant Theresa Beal acquired title to real property as shown in Book 677, Page 205 of the Watauga County Register of Deeds. Thereafter, defendant became delinquent on her tax obligation and plaintiff Watauga County initiated collections for taxes

owed. Defendant's address on record was listed as Post Office Box 1202, Conover, NC 28613.

On or about 6 May 2013, the Watauga County Tax Collections Supervisor (the "Supervisor") attempted to find a valid address for defendant. Plaintiff attempted to contact various individuals, including defendant's mother by phone. On 9 May 2013, defendant contacted the Supervisor, wherein defendant agreed to enter into a payment agreement with plaintiff. During that conversation, defendant provided a facsimile number, but she did not provide any other contact information.

Thereafter, the Supervisor sent a three-page fax to defendant at the fax number provided by defendant. The fax included a cover-sheet, an "Agreement of Payment Schedule," and a "Watauga County Tax Certification." On 17 May 2013, defendant sent a return fax, which included a cover sheet and a copy of the Agreement of Payment Schedule with defendant's signature. No contact information for defendant was added to either page of her return fax.

In 2013, defendant made two payments on her payment plan. The first was made shortly after execution of the payment agreement, and the second was made on 26 June 2013. On 12 May 2014, plaintiff sent defendant a fax including a cover page and a 2013 tax bill. The cover page included a note asking defendant to please call regarding her 2013 tax bill and payment plan and notifying her that failure to do so could result in foreclosure. On 22 May 2014, plaintiff received a third payment from defendant. After the third payment, plaintiff received no further payments or communications from defendant.

As a result, plaintiff sent collection notices to defendant's address of record—Post Office Box 1202, Conover, NC 28613. Thereafter, on 4 September 2015, plaintiff filed a verified complaint in Watauga County District Court to collect the past due taxes from defendant and request a commissioner be appointed to sell the property in order to satisfy plaintiff's tax lien. Defendant's address was listed on the complaint as follows: "Teresa Beal Post Office Box 1202 Conover, NC 28613." The same day the complaint was filed—4 September 2015—plaintiff filed a Notice of Service by Publication, indicating that plaintiff would publish notice in the Watauga Democrat, a newspaper in circulation in the county where the property is located, on 14, 21, and 28 September 2015. Less than a week later, plaintiff filed another Notice of Service by Publication on 10 September 2015, indicating that it intended to publish notice on three additional dates—13, 20, and 27 September 2015.

Thereafter, plaintiff attempted service on 19 October 2015 by certified mail to the same address listed for defendant on the complaint—P.O. Box 1202, Conover, NC, 28613. On 21 October 2015, this was returned as "undeliverable as addressed; unable to forward." On 16 December 2015, plaintiff filed an affidavit of attempted service, based on plaintiff's attempt to serve defendant on 20 October 2015 by certified mail at the Conover post office box address. The affidavit was filed along with a motion for entry of default which was granted by the Watauga County Clerk of Superior Court on the same day.

On 4 January 2016, default judgment was entered. On 9 February 2016, a sale of the property was held, which sale was confirmed on 2 May 2016. On 6 May 2016, a Commissioner's Deed was recorded.

On 20 May 2016, plaintiff's attorney, Stacy C. Eggers, IV,

> received a call from a lady who identified herself as Teresa Roten and stated she was calling about a foreclosure sale [Eggers] had conducted against her. She stated she did not have notice of the sale. [Eggers] told her [he] did not have a foreclosure action against anyone with the last name of Roten pending at that time. She then stated to [Eggers] that the address of the property as 186 Chestnut Knob. [Eggers] asked if this was her residence, and she stated it was a rental property. [Eggers] stated that address did not ring a bell with [him], and she then stated that [Eggers] had the action under the name of Beal, and that she was Teresa Beal Roten. Ms. Roten asked why she had not been served with the Foreclosure Complaint. [Eggers] told her the address that [he] had for her was a post office box in Conover, and she advised that was not her mailing address and that she had moved to another county. [Eggers] asked her if she had changed her mailing address with the County Tax Listing Office, and she stated she had not but that it was common knowledge where she could be found. [Eggers] advised Ms. Roten that [he] was unable to locate anything in the record that indicated a name change to Roten and had been unable to locate her.

On 3 June 2016, defendant filed a motion to set aside and a motion for sanctions, alleging improper service of process. Following a hearing, defendant's motion to set aside was denied by order entered 26 July 2016. Defendant appeals.

On appeal, defendant contends the trial court erred in denying defendant's motion to set aside entry of default, default judgment, foreclosure sale, and commissioner's deed, where service by publication was effectuated before a diligent effort was made to locate and serve defendant personally. We disagree.

A trial court's denial of a motion to set aside and a motion for sanctions is reviewed for abuse of discretion. *Jones v. Wallis*, 211 N.C. App. 353, 356, 712 S.E.2d 180, 183 (2011) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

In its order denying defendant's motion to set aside, the trial court entered eighteen findings of fact in support of its decision. Where "findings have not been assigned as error," they are "deemed binding on appeal." *Lowery v. Campbell*, 185 N.C. App. 659, 664, 649 S.E.2d 453, 456 (2007) (citing *In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 83, 627 S.E.2d 510, 512 (2006)) (concluding that the trial court's denial of the defendant's motion to set aside the entry of default was not manifestly unsupported by reason based on the unchallenged findings as set out in its order). As stated *infra*, defendant's challenge to the trial court's findings of fact is vague at best; however, we (generously) consider defendant's argument regarding due diligence as challenging the trial court's relevant findings of fact.

Rule 4(j1) and Rule 4(k) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 1-75.8 collectively provide, in relevant part, that if, after due diligence, a plaintiff in a foreclosure action cannot serve the defendant by personal delivery, registered or certified mail, or designated delivery service, the defendant may be served by publication in the county where the action is pending. N.C. Gen. Stat. § 1A-1, Rule 4(j1), (k) (2015); N.C.G.S. § 1-75.8 (2015).

"Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Jones*, 211 N.C. App. at 357, 712 S.E.2d at 183 (quoting *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980)). "This Court has held that there is no 'restrictive mandatory checklist for what constitutes due diligence' for purposes of service of

process by publication; '[r]ather, a case by case analysis is more appropriate.' " *Id.* at 358, 712 S.E.2d at 184 (alteration in original) (quoting *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980)). "However, the 'due diligence' test of Rule 4(j1) requires a party to use all reasonably available resources to accomplish service." *Barclays Am./Mortg. Corp. v. BECA Enters.*, 116 N.C. App. 100, 103, 446 S.E.2d 883, 886 (1994) (citing *Williamson v. Savage*, 104 N.C. App. 188, 192, 408 S.E.2d 754, 756 (1991)).

In *Barclays*, upon which defendant relies, the plaintiff's "sole attempt at personal service . . . consisted of a certified letter mailed to the business address of [the defendant, a partnership], a postal box number," *id.* at 103, 446 S.E.2d at 886, before resorting to "notice by posting," *id.* at 104, 446 S.E.2d at 887. Because the evidence revealed that "the public record and other sources . . . were easily accessible to [the] plaintiff, but not utilized[,]" *id.* at 104, 446 S.E.2d at 886, this Court concluded that "this solitary venture"—the plaintiff's sole attempt at service by certified letter to a post office box—"constituted neither application of 'due diligence' as required by Rule 4(j1) nor a 'reasonable and diligent effort' . . . ." *Id.* at 103, 446 S.E.2d at 886.

In the instant case, defendant challenges the trial court's denial of her motion to set aside because, she argues, plaintiff failed to exercise its due diligence in trying to contact her before resorting to notice by publication. From what we can discern from defendant's vague argument in brief on appeal, defendant appears to challenge the trial court's findings that plaintiff made diligent and reasonable efforts to locate her before having default entered against her. Those findings of fact which relate to this issue are as follows:

> 4. Prior to the filing of the Complaint, on or about May 6, 2013, Tax Collection Supervisor . . . ran a Lexis-Nexis Accurint search in an attempt to locate . . . [d]efendant. The address listed in this search did not produce a confirmed address for . . . [d]efendant. On or about May 9, 2013, [the] Tax Collection Supervisor . . . had a telephone conversation with . . . [d]efendant, where [the Supervisor] advised . . . [d]efendant of the need to "catch up" her delinquent taxes in order to avoid a tax foreclosure against her. . . . *[D]efendant provided only a fax number for contact with her*, at (704) 660-4442.
>
> 5. . . . Defendant returned a May 9, 2013 fax from the Tax Collector to [plaintiff] on May 17, 2013, consisting of a fax

cover sheet and an "Agreement of Payment Schedule." This facsimile consisted of two pages as shown on Exhibit 3 of the Affidavit of [the Supervisor], as confirmed by the date, time, and page stamp placed by the facsimile machine on these pages. . . . *[D]efendant did not fax a change of address form back to . . . [p]laintiff, nor did . . . [d]efendant attach a copy of the tax certificate with a new address as alleged in her affidavit.*

. . . .

7. The Watauga County Tax Collection Supervisor was unable to reach . . . [d]efendant at the above listed fax number by her facsimile of May 12, 2014.

8. Watauga County sends out delinquent tax notices to taxpayers at least three times a year, *which were returned as undeliverable.*

9. The Watauga County Attorney made a diligent search of the public records of Watauga County in an attempt to locate an address for [defendant] in order to serve the Verified Complaint, including a search of the tax records of Watauga County and the records of the Watauga County Clerk of Superior Court.

10. Additionally, the Watauga County Attorney attempted to contact . . . [d]efendant prior to filing suit on September 18, 2014 and June 17, 2015 regarding payment of the delinquent taxes. These letters were returned as "Return to Sender; Not Deliverable as Addressed; Unable to Forward."

11. On September 4, 2015, [plaintiff] filed its Verified Complaint for unpaid *ad valorem* real property taxes.

12. On October 19, 2015, [plaintiff] attempted to serve its Complaint upon . . . [d]efendant at the last known address for . . . [d]efendant, Post Office Box 1202; Conover, North Carolina 28613. This letter was returned as "Return to Sender; Not Deliverable as Addressed; Unable to Forward."

13. . . . Defendant, Teresa Beal, has failed to attend to the matter of her unpaid *ad valorem* property taxes with the attention which would be accorded by a reasonable and prudent person.

> 14. [Plaintiff] made diligent and reasonable efforts to locate a valid service address for service of the Verified Complaint upon . . . [d]efendant, Teresa Beal.
>
> 15. The Court finds the Verified Motion of . . . [d]efendant, Teresa Beal, not fully credible.
>
> 16. The inattention of . . . [d]efendant to her unpaid and delinquent *ad valorem* real property taxes constitutes inexcusable neglect.
>
> 17. . . . [D]efendant has failed to present the Court with sufficient evidence of a meritorious defense to the allegations contained in the Verified Complaint.
>
> 18. Based on the totality of the credible evidence presented in this matter, the Motion to Set Aside and Motion for Sanctions is without merit.

(Emphasis added).

The facts of this case are unique in that plaintiff essentially accomplished or satisfied much of the due diligence requirement before the complaint was ever filed. While normally the filing of the complaint is the event which triggers the period in which a party must do its due diligence in attempting service of process by means other than publication—i.e., service by certified mail—it is clear from the evidence in the record and the trial court's findings of fact that long before plaintiff filed its complaint, plaintiff had been unable to reach defendant at the address she provided to the Watauga County Tax Administrator—Post Office Box 1202, Conover, North Carolina, 28613. Therefore, plaintiff knew from experience that service to defendant at the Conover Post Office box would not be fruitful. As such, the record belies any contention that service by anything other than publication at this point would have been fruitful. *See Jones*, 211 N.C. App. at 359, 712 S.E.2d at 185. As stated previously, plaintiff attempted to contact defendant prior to filing suit at the Conover Post Office box address on two previous occasions—18 September 2014 and 17 June 2015—and both letters were returned as "Return to Sender; Not Deliverable as Addressed; Unable to Forward." Indeed, defendant admitted during her 20 May 2016 phone call to plaintiff's attorney regarding the foreclosure sale that the Conover Post Office box was no longer her mailing address, she had moved to another county, and changed her name, all without notifying the County Tax Listing Office. Defendant's contention that "it was common knowledge where she could be found" will not suffice where the

record suggests that since at least 2013, defendant appears to have made every effort to purposefully conceal exactly that fact, i.e., the fact of her whereabouts, at least for the purposes of plaintiff's collecting duly owed property taxes. In other words, defendant will not now be heard to complain on appeal about lack of notice where she failed in the first place to provide notice to the County Tax Listing Office that she had changed her name and moved to another county.

"[A] plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of 'due diligence.' This is particularly true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful." *Id.* "Rule 4(j1) requires 'due diligence,' not that a party explore every possible means of ascertaining the location of a defendant." *Id.* at 358–59, 712 S.E.2d at 184.

Based on the circumstances of this case, we conclude that where plaintiff already knew from extensive prior experience with defendant that it could not with due diligence effect service of process on defendant by personal delivery or by registered or certified mail, *see* N.C.G.S. § 1A-1, Rule 4(j1), plaintiff's actions satisfied the "due diligence" necessary to justify the use of service of process by publication. Thus, the trial court did not err or abuse its discretion in denying defendant's motion to set aside entry of default, default judgment, foreclosure sale, and commissioner's deed, and defendant's argument is overruled.

AFFIRMED.

Judges CALABRIA and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 3 October 2017)

BARTLETT v. BARTLETT No. 17-248	New Hanover (16CVD107)	Affirmed
BRADY v. BEST BUY CO., INC. No. 17-315	N.C. Industrial Commission (14-708059) (15-720823)	Affirmed
GYEDU-SAFFO v. DUNCAN No. 17-86	Mecklenburg (14CVD3610)	Affirmed
IN RE M.D.H. No. 17-326	Columbus (15JT58-59)	Affirmed
IN RE T.R.K. No. 17-303	Catawba (16SPC50903)	Vacated and Remanded
KEDAR v. PATEL No. 16-781	Mecklenburg (13CVS9860)	Affirmed
McKINNON v. McKINNON No. 17-152	Robeson (12CVD2697)	Affirmed
MOORE v. MCKENZIE No. 17-53	Harnett (16CVD669)	Affirmed
PERRY v. W. MARINE, INC. No. 17-243	Wake (16CVS5407)	Affirmed
STATE v. BARNES No. 17-14	Wilson (15CR703890)	Vacated and Remanded
STATE v. BARNES No. 17-15	Wilson (15CR703311)	Vacated and Remanded
STATE v. BOWENS No. 16-1312	Wilson (15CR54322)	Vacated
STATE v. BUTLER No. 17-144	Edgecome (14CRS51551-52)	JUDGMENT ARRESTED IN PART; NO ERROR IN PART
STATE v. BYNUM No. 17-4	Wilson (15CR51982)	Vacated and Remanded
STATE v. BYNUM No. 17-5	Wilson (15CR52515)	Vacated and Remanded

STATE v. CANNON No. 17-17	Wilson (14CR055000)	Vacated and Remanded
STATE v. CLYBURN No. 17-258	Union (14CRS1605) (14CRS1606)	No Error
STATE v. DEJESUS No. 16-1326	Wilson (15CR52174)	Vacated and Remanded
STATE v. EAVES No. 17-159	Mecklenburg (13CRS236146)	Affirmed
STATE v. ELLIOTT No. 17-338	Cumberland (15CRS55180) (15CRS55672) (15CRS55673)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART; DISMISSED WITH PREJUDICE IN PART.
STATE v. GARDNER No. 16-1089	Pitt (05CRS57020) (06CRS54112)	Affirmed
STATE v. GOMEZ No. 16-1327	Wilson (15CR52188)	Vacated and Remanded
STATE v. HARRISON No. 17-16	Wilson (15CR701814)	Vacated and Remanded
STATE v. HOLLOMAN No. 16-658	Buncombe (15CRS708839) (15CRS87822)	No plain error
STATE v. ISOM No. 17-24	Cabarrus (15CRS50858) (15CRS50860)	No Error
STATE v. JACKSON No. 17-250	Rowan (16CRS50550)	No Error
STATE v. McDONALD No. 17-246	Mecklenburg (13CRS243916-19)	No Error
STATE v. MERCER No. 16-1314	Wilson (15CR117)	Vacated
STATE v. MITCHELL No. 16-1323	Wilson (14CR54833)	Vacated and Remanded

STATE v. MITCHELL No. 17-534	Wilson (15CRS053920)	Vacated and Remanded
`STATE v. OWENS No. 16-1313	Wilson (15CR53062)	Vacated
STATE v. PAIGE No. 17-102	Pitt (12CRS53795) (13CRS3949)	Affirmed
STATE v. RAMSEY No. 17-175	Mecklenburg (15CRS213363) (15CRS25213)	DISMISSED WITHOUT PREJUDICE
STATE v. REAVES No. 16-1311	Wilson (15CR702523)	Vacated
STATE v. ROBERTSON No. 17-199	Buncombe (14CRS80428)	No Error
STATE v. ROUSE No. 17-176	Forsyth (15CRS59002)	No Error
STATE v. SAULS No. 17-6	Wilson (15CR52185)	Vacated and Remanded
STATE v. SURRATT No. 17-65	Cleveland (15CRS50222-23)	No Error
STATE v. TAYLOE No. 16-1032	Forsyth (15CRS50070)	No Error
STATE v. THOMAS No. 17-120	Watauga (16CRS50168-69) (16CRS575)	Affirmed
STATE v. THOMAS No. 17-162	Richmond (15CRS50942)	No Error
STATE v. VILLA No. 16-1104	Johnston (15CRS52234)	No Error
STATE v. VILLALOBOS No. 17-269	Mecklenburg (14CRS237025) (14CRS237812)	No Error
STATE v. WIGGINS No. 17-18	Wilson (14CR002440)	Vacated and Remanded

STATE v. WILLIAMS No. 17-3	Wilson (16CR50799)	Vacated and Remanded
STEWART v. SHIPLEY No. 17-378	Surry (16CVS199)	Dismissed
TAYLOR v. MYSTIC LANDS, INC. No. 16-1282	Swain (15CVS246)	Affirmed

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